Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

85-380

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CAMDEN FIRE INSURANCE ASSOCIATION,
Appellant,

v.

LONNIE JUSTICE,
Appellee.

Appeal from the Supreme Court of Appeals of West Virginia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a clearly worded procedural rule which is given a strained and unforeseen judicial interpretation prejudicial to the rights of the party relying upon the rule's clear language, offends the due process guarantee of the Federal Constitution.

2. Whether a party who relies on the clear wording of a procedural rule and is prejudiced by retrospective application of a new and unforeseeable exception to the rule, is thereby denied due process under the Fourteenth Amendment to the Federal Constitution.

DESIGNATION OF CORPORATE RELATIONSHIPS

Appellant, Camden Fire Insurance Association, a corporation, filing this Jurisdictional Statement states that it and three other insurance companies namely, General Accident Insurance Company of America, Pennsylvania General Insurance Company and Potomac Insurance Company of Illinois, collectively are known as the General Accident Insurance Group.

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CAMDEN FIRE INSURANCE ASSOCIATION,
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v.

LONNIE JUSTICE,
Appellee.

Appeal from the Supreme Court of Appeals of West Virginia

JURISDICTIONAL STATEMENT

Camden Fire Insurance Association (Appellant) appeals from a final judgment of the Supreme Court of Appeals of West Virginia.

OPINION BELOW

The Supreme Court of West Virginia, by a four-to-one vote, affirmed in part certain orders of the Circuit Court of McDowell County, West Virginia denying Appellant's motion to set aside $275,000.00 in punitive damages entered upon a jury verdict assessing total damages in the amount of $361,276.16. The case for which Appellant seeks review was consolidated on appeal with another case and, the majority and dissenting opinions of the Supreme Court of Appeals of West Virginia are re-

printed at App. 1a. The entire decision is reported at 332 S.E.2d 127 (W. Va. 1985).

JURISDICTION

The original plaintiff and Appellant herein, Camden Fire Insurance Association, had a default judgment taken against it on the defendant's counterclaim due to Camden's failure to provide answers to interrogatories propounded by defendant's counsel. The hearing on damages resulted in a jury award which exceeded by $275,000.00 the amount of punitive damages prayed for in the counterclaim's demand for judgment. Over objection by Camden, the trial court allowed the defendant to increase by $275,000.00 the demand in his counterclaim and judgment was entered accordingly. The allowance of the post-verdict amendment as affirmed by the Supreme Court of Appeals of West Virginia draws into question the validity of Rule 54(c) of the West Virginia Rules of Civil Procedure as interpreted and applied to the Appellant. Appellant maintains that the unique construction given to Rule 54(c), which was then retroactively applied, is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.[1]

Like the equivalent federal rule, West Virginia Rule 54(c) clearly states that "[a] judgment by default shall not . . . exceed in amount that prayed for in the demand for judgment". However, the trial court and Supreme Court of Appeals upheld a *post*-verdict amendment which allowed the final judgment of punitive damages to exceed by $275,000.00 the amount prayed for in the coun-

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[1] The Supreme Court of Appeals of West Virginia has held that the rules of civil procedure which it has adopted and promulgated unquestionably "have the force and effect of a statute . . ." Crusenberry v. Norfolk & Western Ry, 155 W. Va. 155, 159, 180 S.E.2d 219, 222 (1971). Thus, the procedural rules involved meet the "state statute" requirement of 28 U.S.C. S. 1257(2). *Compare* Martin v. Walton, 368 U.S. 25 (1961); *see also*, Re R. M. J., 455 U.S. 191 (1982); Mayer v. City of Chicago, 404 U.S. 189 (1971).

terclaim's demand for judgment. While West Virginia's highest court gave no basis for sustaining the validity of the Rule in face of the constitutional challenge, the majority opinion did hold that the Rule "does not apply where the judgment by default has been rendered as a result of the defaulting party's failure to obey an order of the circuit court to provide or permit discovery under *W. Va. R. Civ. P. 37(b) and the defaulting party otherwise appears at the subsequent trial on the issue of damages.* (App. at 25a) *Id.*, 332 S.E.2d at 140. (Emphasis by the court.)

The substantial federal questions raised by this Appeal concern whether the order of the Supreme Court of Appeals of West Virginia entered on June 11, 1985 (one justice absent), denying Appellant's Petition for Rehearing and ordering that its order entered on April 11, 1985 be made absolute and certified as directed, denied Appellant its right to due process of law guaranteed under the Fourteenth Amendment to the Constitution of the United States of America.

Appellant's initial challenge to the constitutionality of the trial court's allowance of the post-verdict amendment was made by its trial counsel, Mr. Crockett, as a basis for granting his June 10, 1983 motion to set aside the judgment. (App. 60a) However, on June 29, 1983, that motion was denied. (App. 31a) After present counsel was retained by Appellant and a transcript of the trial completed in November, 1983, new motions were made to set aside the jury verdict, the judgment order entered thereon and the denial of Camden's previously made motion to set aside the jury verdict. Appellant's counsel, in seeking to have the trial court set aside its order allowing the post-verdict amendment to the demand for judgment, took the position that basic concepts of procedural due process demanded strict adherence to the requirement of Rule 54(c) that the final judgment "not . . . exceed in amount that plead for in the demand for

judgment". If interpreted and applied as written Rule 54(c) would not deny due process. However, the West Virginia Supreme Court's interpretation and application of that Rule upholding a post-verdict increase in damages where the rule directed that no such increase be allowed, denied Appellant procedural due process.

After being denied all relief by the trial court, Appellant filed its Petition for Appeal with the Supreme Court of Appeals of West Virginia and therein specifically claimed that "[t]he trial court's decision to allow the defendant [Justice] to amend his ad damnum clause clearly violates both Rule 54(c) of the West Virginia Rules of Civil Procedure and the due process clause of the Fourteenth Amendment". (App. 91a). After that court granted the appeal, Appellant in its Brief on Behalf of Appellant specifically contended that "the lower court's error in refusing to set aside the void portion of the judgment, i.e., $275,000.00, was a plain abuse of discretion because courts have uniformly held that the decision as to whether or not to vacate a void judgment is not within the discretion of the trial court, but rather is mandated by due process considerations." (App. at 104a-105a.) To further emphasize its contention, Appellant in its Reply Brief captioned its first argument as follows: "The Lower Court Abused Its Discretion In Failing To Set Aside Its Earlier Order Granting A Post-Verdict Amendment Since That Order Was Void, Unconstitutional And Unauthorized By The Rules Of Civil Procedure". (App. at 113a)

On April 11, 1985, the West Virginia Supreme Court of Appeals rendered its decision (one justice dissenting) finding that the post-verdict amendment did not constitute an abuse of judicial discretion and specifically ruling that "the restriction contained in *W. Va. R. Civ. P.* 54(c) that '[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment' does not apply where

the judgment by default has been rendered as the result of the defaulting party's failure to obey an order of the circuit court to provide or permit discovery under *W. Va. R. Civ. P.* 37(b) *and the defaulting party otherwise appears at the subsequent trial on the issue of damages.* The circuit court, therefore, did not err when it granted the appellee's motion to increase his original demand for judgment." (Emphasis by the Court) (App. at 25a: 332 S.E.2d at 140.)

CONSTITUTIONAL PROVISION

Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATUTORY PROVISION

West Virginia Code Chapter 51, Article 1, Section 4a provides in pertinent part:

"The inherent rule-making power of the supreme court of appeals is hereby declared,

When and as the rules of the court herein authorized shall be prescribed, adopted and promulgated, all laws and parts of laws that conflict therewith shall be and become of no further force or effect to the extent of such conflict."

STATE RULES OF CIVIL PROCEDURE INVOLVED

Rule 37. Failure to Make Discovery; Sanctions.

(a) *Motion for order compelling discovery.*—A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

. . . .

(b) *Failure to comply with order.*

(2) Sanctions by Court in Which Action is Pending.—If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such order in regard to the failure as are just, and among others the following:

. . . .

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Rule 54. Judgments; Costs.

. . . .

(c) *Demand for judgment.*—A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Rule 55. Default Judgment.

(a) Reserved.

(b) Entry.—When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, judgment by default may be entered as follows:

(1) Sum Certain.—When the plaintiff's claim against a defendant is for a sum certain or for a sum which

can by computation be made certain, the court upon request of the plaintiff and upon affidavit showing the defendant's failure to appear and the amount due shall direct the entry of judgment by the clerk for that amount and costs against the defendant, if he is not an infant, incompetent person, or incarcerated convict.

(2) Other Cases.—In all other cases the party entitled to a judgment by default shall apply to the court therefore and shall file with the court an affidavit showing the other party's failure to appear or otherwise defend; but no judgment by default shall be entered against an infant, incompetent person, or incarcerated convict unless represented in the action by a guaradian, ad litem, committee, curator or other representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary.

(c) *Setting aside default judgment.*—A judgment by default may be set aside in accordance with Rule 60(b).

(d) *Plaintiffs, counterclaims, cross-claimants.*—The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

STATEMENT OF THE CASE

This case arises from Appellant's direct appeal to the Supreme Court of Appeals of West Virginia of an order entered by the trial court on December 21, 1983, denying post-judgment relief in a civil action. No case relating to this case has previously been before this Court. Only the previous proceedings in the courts of West Virginia involve facts pertinent to the position of the Appellant.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(2). On April 11, 1985, the Supreme Court of Appeals of West Virginia (one justice dissenting) affirmed in part a trial court's refusal to set aside an order entered on June 1, 1983 allowing counsel for Mr. Justice, to increase his original demand for judgment in his counterclaim by $275,000.00 after return of a jury award of $300,000.00 in punitive damages.

On September 22, 1981, Camden Fire Insurance Association filed a declaratory judgment action in the Circuit Court of McDowell County, West Virginia against Lonnie Justice, the named insured upon a fire insurance policy, seeking a declaration on whether he, as the named insured, had an insurable interest in the insured dwelling at the time it was destroyed by fire. (App. 46a) After the filing of an answer, counsel for Mr. Justice obtained leave of court to file an amended answer which included a counterclaim against Camden Fire Insurance Association for a lack of good faith and fair dealing as an insurer and demanding $25,000.00 in punitive damages. (App. 51a; App. 55a)

On December 2, 1982, the attorney for Lonnie Justice filed a set of interrogatories to be answered by Camden Fire Insurance Association and served a copy of the same upon J. Strother Crockett, the attorney then representing Camden. On February 3, 1983, the interrogatories having gone unanswered, an oral motion compel-

ling discovery was heard by the judge of the Circuit Court of McDowell County and an order was entered compelling Camden to answer the interrogatories by February 14, 1983. The answers to the interrogatories still having not been provided by April 20, 1983, the attorney for Mr. Justice filed a motion to strike Camden's pleadings which motion the court construed as a motion for entry of default judgment. (App. 39a) On April 26, 1983, that motion was heard and granted with the court entering a default judgment order against Appellant on Mr. Justice's counterclaim and setting a hearing for assessment of damages on May 6, 1983. (App. 39a) The hearing on damages was continued until May 31, 1983 at which time a jury was empaneled to hear evidence on the issues of damages. On June 1, 1983, the jury returned a verdict in the amount of $61,276.16 in compensatory damages and $300,000.00 in punitive damages which was $275,000.00 in excess of the amount of punitive damages sought in the counterclaim's demand for judgment.[2] (App. 34a) *After* the jury verdict had been returned, the attorney for Lonnie Justice moved the court to amend the counterclaim's demand for judgment so that the total demand for punitive damages would be $300,000.00. Although the applicable state rule of civil procedure in effect at the time expressly provided that "[a] judgment by default shall not . . . exceed in amount that plead for in the demand for judgment", over objection of the attorney for Appellant, the trial court allowed the amendment and entered judgment in the total sum of $361,276.16 plus interest and cost. (App. 32a)

Despite Appellant's contention that allowance of the *post*-verdict amendment amounted to an abuse of judicial

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[2] The counterclaim's demand for judgment sought $63,900.00 in compensatory damages for breach of contract and $25,000.00 in punitive damages. Thus, the amendment allowed an increase above the punitive damages as well as the total amount of damages originally demanded. (App. 55a).

discretion sufficient to offend procedural due process, the opinion of the state supreme court did not address the issue of the constitutionality of the post-verdict increase in the demand for judgment. More importantly, since it was by its opinion that the Supreme Court of Appeals of West Virginia announced the new and unforeseen exception to Rule 54(c), Appellant's first opportunity for challenging application of that exception to it was after the court's decision. Consequently, in its Petition for Rehearing, Appellant once again brought to the attention of the West Virginia court the serious constitutional issues raised by upholding a judgment which exceeded the amount set forth in the demand where the procedural rule specifically provided that the award could not exceed the amount of the demand when the judgment had been obtained by default. (App. 123a) More specifically, Appellant further advised the Supreme Court of Appeals that by holding the limitations of Rule 54(c) inapplicable where the defaulted party appeared at the trial on damages, the court was announcing a new procedural rule and, without notice, applying it retrospectively to the Appellant. Finally, in light of the unique exception given to the Rule by the court, Appellant reserved its right to assert in a local federal court that the newly announced rule was at least unconstitutional as applied to it. However, Appellant files this Appeal believing appeal lies for a complete and efficient adjudication of its constitutional rights and with concern that the doctrines of federal court abstention [3] and issue preclusion [4] may bar any other federal court action by Appellant.

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[3] *Compare,* Pineman v. Oechslin, 637 F.2d 601 (2d Cir. 1981) holding abstention appropriate *with,* Action Electrical Contracting Corp. v. Ross, 644 F.2d 44 (2d Cir. 1981) holding abstention not appropriate.

[4] Angel v. Bullington, 330 U.S. 183 (1947); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); Kaufman v. Somers Board of Education, 368 F.Supp. 28 (D. Conn. 1973).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Introductory Statement

This Court has consistently held that appeal lies where a state's highest court upholds the validity of a state statute applicable to the party upon a given set of facts as against the party's contention that such application is invalid on constitutional grounds. *Cohen v. California*, 403 U.S. 15, 17-18 (1971); *Warren Trading Post v. Arizona Tax Commissioner*, 380 U.S. 685, 686 and n.1 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61 n.3 (1963).

In this case the majority opinion of the Supreme Court of Appeals of West Virginia created an exception to the clear and unambiguous wording of Rule 54(c) of the West Virginia Rules of Civil Procedure and then immediately applied it to Appellant. The immediate application of that exception, which in fact was a retrospective application, violated due process guaranteed to Appellant in two respects.

First, by refusing to follow the clear language of its own procedural rule the Supreme Court of Appeals of West Virginia interpreted Rule 54(c) in arbitrary manner violative of the due process guaranteed Appellant by the Fourteenth Amendment.

Second, the Supreme Court of Appeals of West Virginia by retroactively applying its newly created and unforseeable exception to Rule 54(c), violated the due process guaranteed the Appellant by the Fourteenth Amendment.

I. By Failing to Follow the Clear Language of its Own Procedural Rule and Giving it a Strained and Unforeseeable Interpretation, the Supreme Court of Appeals of West Virginia Erroneously Upheld the Validity of Rule 54(c) in a Manner Violative of the Due Process Guaranteed Appellant by the Fourteenth Amendment.

This Court has repeatedly emphasized that "fundamental fairness" is the touchstone of the due process

guaranteed by the Fourteenth Amendment. *Bearden v. Georgia*, 461 U.S. 660, n.7 (1983); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). Fundamental fairness requires that clearly written rules governing future conduct of litigants and their counsel be applied as written. The essence of Appellant's challenge to the validity of Rule 54(c) is that the interpretation given to that Rule by the Supreme Court of Appeals was unconstitutional since the court failed to abide by the clear language of the Rule. *See Southern Ariz. School for Boys, Inc. v. Chery*, 580 P.2d 738, 743 (Ariz. App. 1978), and cases cited therein. This Court, as other courts, has recognized that where individuals may rely upon administrative rules and regulations, concern for procedural due process enjoins regulatory bodies to abide by those rules and regulations to avoid substantially prejudicing those who have based their actions upon them.[5] The failure of the West Virginia courts to abide by the simple proposition that rules and regulations are to be fairly applied in accordance with their terms has resulted in Appellant being denied due process.

The Supreme Court of Appeals of West Virginia was only able to uphold the validity of Rule 54(c) and allow the amount of the judgment to exceed the demand by giving the Rule an interpretation contrary to the clear language of the Rule.[6] Obviously, the wording of Rule 54(c)

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[5] United States v. Caceres, 440 U.S. 741, 752-3, n. 15 (1979); United States v. Leahey, 434 F.2d 7, 10-1 (1st Cir. 1970); *see also* United States v. Hernandez-Rojas, 617 F.2d 533 (9th Cir.) holding no due process violation since no substantial prejudice to affected party. Similarly, see Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir.), *cert. denied*, 338 U.S. 816 (1949), holding court's noncompliance with 3-day notice requirement as to defaulted, but appearing, parties violated due process.

[6] For example, by its interpretation of Rule 54(c) the court held that the words "shall not . . . exceed" were not a mandatory prohibition. However, as to its procedural rules the court pre-

of the West Virginia Rules of Civil Procedure, having been adopted from the Federal Rules of Civil Procedure, is not unique. Lugar & Silverstein *W. Va. Rules* at xv (1960). Indeed, the same wording of Federal Rule of Civil Procedure 54(c) has been referred to as a mandate that is "very simple, clear and decisive". *Fong v. United States*, 300 F.2d 400, 413 (9th Cir. 1962).

It violates the precept of fundamental fairness to allow a party to increase his demand for judgment after the jury returns its verdict where the express language of the applicable procedural rule provides that a judgment shall "not . . . exceed in amount that plead for in the demand for judgment". With respect to that very wording a leading treatise matter of factly has so stated. "It would be *fundamentally unfair* to have the complaint lead defendant to believe that only a certain type and dimension of relief was being sought and then, should he attempt to limit the scope and size of the potential judgment against him by not appearing or otherwise defending, allow the court to give a different type of relief or a larger demand award". 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2663 at 140 (1981) (emphasis added). Obviously, "one of the primary purposes of modern systems of civil procedure which has its roots in notions of *fundamental fairness* and due process, is to prevent the use of surprise and procedural ambush . . ." *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 717 n.6 (4th Cir. 1983) (emphasis added). *Accord Wetmore v. Karrick*, 205 U.S. 141, 160 (1907); *Dils v. City of Chicago*, 378 N.E.2d 1130, 1136 (Ill. App. 1978). Indeed, citing constitutional concerns of fundamental fairness, in *Atlantic Purchasers, Inc.* the Fourth Circuit affirmed a trial court's refusal to allow a prevailing plaintiff to amend its claim in order to obtain

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viously had held that the word "shall" was a mandatory directive. Crusenberry v. Norfolk & W. Ry, 155 W. Va. 155, 159, 180 S.E.2d 210, 222 (1971).

treble damages under North Carolina's unfair trade practices act. Although it was not confronted with a default situation, the court stated that even in non-default cases "Rule 54(c) is not, however, without its limits".

> A party will not be given relief not specified in its complaint where the "failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief". *United States v. Marin*, 651 F.2d 24, 31 (1st Cir. 1981). Accord, *Robinson* 444 F.2d at 803. In particular, a substantial increase in the defendant's potential ultimate liability can constitute specific prejudice barring additional relief under Rule 54(c). See *Goodman v. Poland*, 395 F.Supp. 660, 685 (D. Md. 1975). We believe that this exception to this Rule is applicable in the present case.

Id. 705 F.2d at 716-7. Indeed, Appellant's brief before the Supreme Court of Appeals of West Virginia pointed out that the Fourth Circuit has emphatically stated that allowance of post-verdict amendments which increase damages not only involve a trial court's "abuse of discretion" but raise "a serious question whether the judgment was not 'null and void' for reasons" of violations of due process. *Compton v. Alton Steamship Co.*, 608 F.2d 96, 107 n.21 (4th Cir. 1979). (App. 108) However, despite such authority, the Supreme Court of Appeals of West Virginia concluded that the additional judgment of $275,000.00 was not void and that the post-verdict amendment did not violate the state's rule of civil procedure. *Compare Simer v. Rios*, 661 F.2d 655, 663-4 (7th Cir. 1981) holding failure to give notice required by Rule 23(e) violated due process and was therefore void.

The Supreme Court of Appeals of West Virginia in its opinion relied upon four federal cases for authority that appearance of the defaulted party at the hearing on damages authorized upholding a *post*-verdict motion to increase the demand for judgment. *Trans World Airlines*,

Inc. v. Hughes, 449 F.2d 51 (2d Cir. 1971); *Peitzman v. City of Illmo*, 141 F.2d 956 (8th Cir. 1944), *cert. denied*, 323 U.S. 718 (1944); *Sarlie v. E. L. Bruce Co.*, 265 F.Supp. 371 (S.D.N.Y. 1967); *Growth Properties, Inc. v. Klingbeil Holding Co.*, 419 F.Supp. 212 (D. Md. 1976). However, none of those decisions so held. The three principal federal cases cited by the West Virginia court involved *pre*-verdict amendments not a *post*-verdict amendment as is present in this case. "[I]n *TWA*, Hughes Tool Company was put on notice *prior to default* that TWA would apply for an increase in the ad damnum." 6 *Moore's Federal Practice* at 1233 n.11 (emphasis added). In *Peitzman* the court dealt with "amendments at the trial", 141 F.2d at 962.[7] Moreover, in *Peitzman* there were "pre-trial attempts in the Trial Court to effectuate on the record an increase in the demanded amount." *Fong v. United States*, 300 F.2d 400, 413, (9th Cir. 1982) analyzing the *Peitzman* decision.[8] In *Sarlie* the amendment came "after the complaint and answer have been filed and pre-trial discovery begun", 265 F.Supp. at 377. In the fourth case cited by the West Virginia court, *Growth Properties, In* , the motion for amendment did come after the hearing on damages but only involved an interest claim and the court in fact refused to permit the amendment "primarily because plaintiff can so easily bring another action". 419 F.Supp at 221. Thus, there

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[7] In discussing the *Peitzman* decision the court in Fong v. United States, 300 F.2d 400, 413 (9th Cir. 1982), observed that neither the author of *Moore's Federal Practice* nor the plaintiff in *Fong* "cite any court decision other than *Peitzman*, supra—a most notable and significant situation in view of the great mass of cases interpreting the Federal Rules of Civil Procedure decided subsequent to *Peitzman*, supra".

[8] In *Peitzman* itself, the Eighth Circuit Court of Appeals found that "the record is in a confused condition" and "[i]n this state of the record it is doubtful whether the prayer for punitive damages was in fact increased in amount." Peitzman v. City of Illmo, 144 F.2d 956, 962 (8th Cir. 1944).

is no authority to support upholding a *post*-verdict amendment in a default case where the applicable procedural rule provides that the judgment shall not exceed the prayer. Indeed, numerous courts have either refused to allow amendments in default cases or found judgments based on the same to be void as exceeding judicial authority. *See, Compton v. Alton Steamship Co.*, 608 F.2d 96, 104-5 n. 16 (4th Cir. 1979), and the ten cases cited thereat.

The fundamental *un*fairness of allowing recovery of damages in excess of the demand where the rule clearly states such damages may not exceed those demanded, is demonstrated in the first instance, not by persuasive authority, but by the language of the rule itself. First, Rule 55(d) of the West Virginia Rules of Civil Procedure provides that "in *all* cases, a judgment by default is subject to the *limitations* of Rule 54(c)". (Emphasis added). Like the equivalent rule of federal civil procedure, West Virginia Rule 54(c) by limitation provides that "a judgment by default *shall not* be different in kind from or *exceed* in amount *that plead for* in the demand for judgment". (Emphasis added). Consequently, it has been held that any judgment by default which is different in kind or exceeds in amount that plead for in the demand for judgment constitutes a void judgment. *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1024-6 (5th Cir. 1982); 49 C.J.S. *Judgments* § 214(b)(2) (1947); *See, Compton v. Alton Steamship Co.*, 608 F.2d 96, 106 (4th Cir. 1979). The decision of the Supreme Court of Appeals of West Virginia, upholding the *post*-verdict amendment increasing the damages far in excess of those to which Appellant had been put on notice could be recovered, was fundamentally unfair.[9] By not following the

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[9] There is a similarity between the improper allowance of increased damages and the improper consideration of matters going beyond those noticed for hearing in violation of due process guarantees. See, Soule Glass and Glazing Co. v. N.L.R.B., 652 F.2d

unambiguous language of the procedural rules limiting damages recoverable in *all* cases where judgment is taken by default, the West Virginia Supreme Court denied Appellant its constitutional right to due process under the Fourteenth Amendment to the Constitution of the United States. *Compare Johnson v. Udall*, 292 F.Supp. 738, 749-750 (C. D. Cal. 1968). The construction given to Rule 54(c) being contrary to its clear language was "plainly erroneous" and inconsistent with the concept of fundamental fairness. *See generally, Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). The surprise judicial exception announced by the Supreme Court of Appeals was unquestionably contrary to the plain language of the procedural rules and denied Appellant due process of law.

II. In Holding its Newly Created and Unforeseen Exception to Rule 54(c) Could be Validly Applied Retrospectively to the Appellant, the Supreme Court of Appeals of West Virginia Violated The Procedural Due Process Guaranteed by the Fourteenth Amendment.

Since the West Virginia court failed to address the constitutional issue raised by Appellant, it could be inferred that the court sought to avoid a due process deficiency by allowing a monetary judgment to exceed the amount prayed for in the demand only where the defaulted party's attorney appears at the hearing on damages. However, one court has held the fact that the defaulting party appears at the hearing on damages does not allow the court "to escape the explicit and emphatic mandate of Rule 54(c)" that in *all* cases a judgment by

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1055, 1074 (1st Cir. 1981), finding a failure to clearly define the issues as violative of due process. Mere participation at a hearing of unnoticed matters cannot constitute a waiver of constitutional due process rights unless the waiver is clear and unequivocal since even in the civil area this Court "indulges every reasonable presumption against waiver." Fuentes v. Shevin, 407 U.S. 67, 94 n. 31 (1983), quoting from Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1936).

default is subject to the limitations of Rule 54(c). *Fong v. United States*, 300 F.2d 400, 413 (9th Cir. 1962). More importantly, Appellant had no notice at the time of the damage hearing in this case that such an exception to the limiting language of Rule 54(c) would either be forthcoming or applied to it.

There can be little doubt that the decision of the Supreme Court of Appeals did in fact engraft onto the existing rule a new and previously unforeseeable exception. The court clearly demonstrated this when it emphasized the wording being added to the existing rule.

> "[T]hat the restriction contained in W. Va. Rule Civ. P. 54(c) that '[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment', does not apply where the judgment by default has been rendered as the result of the defaulting party's failure to obey an order of the circuit court to provide or permit discovery under W. Va. R. Civ. P. 37(b) *and the defaulting party otherwise appears at the subsequent trial on the issue of damages.*

(App. at 25a; 332 S.E.2d at 140.) (Emphasis by the court.) That this "attorney appearance" exception to the "no increase" in damage rule was unforeseen and unforseeable is demonstrated by the fact that in December, 1982 the West Virginia Supreme Court itself, in a footnote to a published opinion stated "W. Va. Rule 54(c) provides that a default judgment shall 'not differ in kind from or exceed in amount that prayed for in the demand for judgment'. *A default judgment that exceeds the prayed for relief violates this rule.*" *Cordell v. Jarrett*, 301 S.E.2d 227, 231 n.3 (W. Va. 1982). (Emphasis added.) (Rehearing denied March 30, 1983). Yet, despite the unequivocal declaration in *Cordell* that "[a] default judgment that exceeds the prayed for relief violates this rule", the West Virginia Supreme Court held in this case that a judgment could exceed the amount demanded

in the prayer for relief. Obviously, in light of the explicit language of the rule, the just quoted statement in *Cordell v. Jarrett*, and the history of the rule, neither Appellant nor its attorney could have reasonably foreseen in the Summer of 1983 that the additional language, now engrafted onto such rule, would be forthcoming.

Whether such a new principle of procedural law as announced in this case may be applied without prior notice to parties acting in accordance with established principles of law, raises a substantial federal question which was the focus of this Court's attention in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Application of the analytical framework provided in *Chevron Oil* clearly mandates that the judicially created exception to the limitation of Rule 54(c) not be applied to Appellant but only be applied prospectively.

Applying the first factor given in *Chevron Oil*, it is evident that in light of the clear language of Rule 54(c) the exception engrafted onto it "was not clearly foreshadowed"; rather, in light of the clear statement by the Supreme Court of Appeals in *Cordell v. Jarrett*, that such a judgment "violates this rule," *supra*, 301 S.E.2d at 231, n.3, the court engaged in "overruling clear past precedent." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). Consequently, on both grounds, the decision of the state's highest court did "establish a new principle of law." *Id.*

Secondly, the "history of the rule" consideration, reveals that no such post-verdict amendment in default cases was intended to be allowed. The history of the equivalent federal rule, from which the state rule was patterned,[10] clearly reflects that *all* defaults, be they by reason of nonappearance or resulting from court imposed sanctions, are not to exceed the amount prayed for in the demand. One of the leading treatises sets

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[10] Lugar & Silverstein, *W. Va. Rules* at Introduction (1960).

forth the following analysis of Rule 54 as ultimately drafted and adopted by the Advisory Committee:

> [T]he first sentence of Rule 54(c) may be thought of as expressing a simple, but important, principle—at any point in a case a defendant is entitled to determine his maximum liability, as fixed by the ad damnum as it stands at that point in the case, and decide whether he will proceed further. If he chooses not to, his liability cannot be increased. This principle seems applicable whether or not defendant appears at the damage hearing and therefore should not turn on when the default occurs.

10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2663 at p. 144 (1981). Indeed, the contention that not all defaults should be governed by the limitations of Rule 54(c), but only those resulting from non-appearance, was specifically rejected by the Advisory Committee on the Federal Rules. See *Transcript of Proceedings, Meeting of Advisory Committee on Federal Rules of Civil Procedure*, November 15, 1935 at pp. 452 (Charles E. Clark Papers, Box 94, Folder 2).[11]

Analysis of the third consideration of "the inequity imposed" by application of the new rule unquestionably favors Appellant for the decision runs counter to accepted judicial understanding of fundamental fairness as discussed previously herein. "[I]f a change is indicated it should come by amendment." 10 C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d* § 2663 at 145 (1981).

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[11] In Whalen v. Ford Motor Credit Co., 684 F.2d 272, 275 n. 8 (4th Cir. 1982), the Fourth Circuit Court of Appeals stated; "[These] materials are fully accessible as a consequence of deposits by members of the Advisory Committee on the Civil Rules with several lawschools with which they had affiliations: Charles E. Clark, (Yale University), Edmund M. Morgan, (Howard University), Edgar B. Tolman, (University of Chicago), and Monte M. Lemann, (Tulane University)."

When the Supreme Court of Appeals of West Virginia by its decision in this case impliedly, but clearly, rejected the Appellant's constitutional claim and upheld as valid a spontaneously created exception, Appellant immediately filed a Petition for Rehearing in which its specifically advised the court that applying such a new Rule to it most likely offended procedural due process. (App. at 134a.) In addition, Appellant in its Petition for Rehearing sought to reserve its right to challenge that application before a federal district court in conformity with this Court's directive in *England v. Louisiana Medical Examiners*, 375 U.S. 411, 420-1 (1964). The Petition for Rehearing filed by Appellant before the Supreme Court of Appeals of West Virginia specifically stated:

> Applying the analytical framework set forth in *Chevron Oil* it is clear (1) that a new rule of procedural law has been established (2) that the new rule is inconsistent with the history and judicial pronouncements of that rule and (3) that application of the new rule imposes substantial inequity against Camden. Thus, applicaiton of the newly pronounced Rule 54(c) specifically prejudices Camden and application of the new rule is so unjust as to be an abuse of judicial discretion. Moreover, the abuse of judicial discretion in formulating a new rule and applying it to an unsuspecting litigant, such as Camden, raises serious constitutional due process concerns. However, since this Petitioner desires to reserve a possible federal court constitutional due process challenge to this Court's new judicially announced rule, Camden does not specifically request this Court to decide the constitutionality of its own judicially formulated Rule 54(c). Nevertheless, Petition must inform this Court that the issue of any unjust or prejudicial application of the new Rule to Camden must be considered *in light of* potential due process claims. *England v. Louisiana State Board of Medical Examiners* 375 U.S. 411, 420-1 (1964).

Despite informing the state court in accordance with *England v. Louisiana State Board of Medical Examiners* that its decision must be considered in light of potential due process claims, the Supreme Court of Appeals of West Virginia adamently refused to provide any relief or explanation to Appellant. Upon being advised by the Supreme Court of Appeals in its decision that it was in effect amending Rule 54(c) and giving the amendment retrospective application, Appellant was confronted with the new and unforeseen ruling which entitles it to this appeal. However, out of an abundance of caution Appellant sought to protect all of its rights by reserving its right to seek a federal court resolution of the constitutionality of the application of the new rule. On the other hand, reservation of constitutional issues through application of the principle of *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964), has not expressly been recognized where the action was instituted in the state judicial system, and the doctrine of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), may be construed as denying Petitioner any federal district court relief. Therefore, unless this Court interprets the West Virginia decision as announcing and applying a new principle of law, Appellant has no assurance of receiving any adjudication on its constitutional challenge to the application of the new judicial exception to Rule 54(c) which the Supreme Court of Appeals of West Virginia by its decision has now held was validly applied to Appellant. *Cf. Miofsky v. Superior Court*, 703 F.2d 332 (9th Cir. 1983).

The decision of the Supreme Court of Appeals has produced a substantially inequitable result so egregious that it offends the traditional concept of "fair play". The Appellant had no notice that the clear wording of Rules 55(d) and 54(c) would not be followed. The most Appellant could do was rely on the law as it then was written and interpreted. Due process allows persons

to rely on existing law to govern future conduct. Due process compels that new principles of law not be retroactively applied where there will be resultant hardship and oppression as has now occurred to Appellant. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679-80 (1930); *Compare, Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945).

CONCLUSION

For the foregoing reasons, appeal to the judgment of the Supreme Court of Appeals of West Virginia lies and the due process clause of the Fourteenth Amendment to the Constitution of the United States requires reversal of the allowance of $275,000.00 in punitive damages above the amount sought in the demand for judgment.

Respectfully submitted,

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APPENDICES

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APPENDIX A

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Justice Brotherton dissents and reserves the right to file a dissenting opinion.

No. 16252

LUTHER F. BELL

v.

INLAND MUTUAL INSURANCE COMPANY, a corporation

McDowell County

Affirmed in part;
reversed in part
and remanded

No. 16257

CAMDEN FIRE ASSOCIATION

v.

LONNIE JUSTICE

McDowell County

Affirmed in part;
reversed in part
and remanded

[Filed April 11, 1985]

McHugh, Justice

1. The imposition of sanctions by a circuit court under *W. Va. R. Civ. P.* 37(b) for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion.

2. The striking of pleadings and the rendering of judgment by default against a party as sanctions under *W. Va. R. Civ.* P. 37(b) for that party's failure to obey an order of a circuit court to provide or permit discovery may be imposed by the court where it has been established through an evidentiary hearing and in light of the full record before the court that the failure to comply has been due to willfulness, bad faith or fault of the disobedient party and not the inability to comply and, further, that such sanctions are otherwise just.

3. Although the party seeking sanctions under *W. Va. R. Civ. P.* 37(b) has the burden of establishing noncompliance with the circuit court's order to provide or permit discovery, once established, the burden is upon the disobedient party to avoid the sanctions sought under *W. Va. R. Civ. P.* 37(b) by showing that the inability to comply or special circumstances render the particular sanctions unjust.

4. When a party's counsel intentionally or with gross negligence fails to obey an order of a circuit court to provide or permit discovery, the full range of sanctions under *W. Va. R. Civ. P.* 37(b) is available to the court and the party represented by that counsel must bear the consequences of counsel's actions.

5. "A default judgment obtained in accordance with the provisions of Rule 55(b), West Virginia Rules of Civil Procedure, is a valid and enforceable judgment and a motion to set aside such judgment will not be granted unless the movant shows good cause therefor as prescribed

in Rule 60(b) of the aforesaid Rules of Civil Procedure." Syl. pt. 1, *Intercity Realty Co. v. Gibson*, 154 W. Va. 369, 175 S.E.2d 452 (1970).

6. "A motion to vacate a default judgment is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Syl. pt. 3, *Intercity Realty Co. v. Gibson*, 154 W. Va. 369, 175 S.E.2d 452 (1970).

7. Prejudgment interest accruing on amounts as provided by law prior to July 5, 1981, is to be calculated at a maximum annual rate of six percent under *W. Va. Code*, 47-6-5(a) [1974], and thereafter, at a maximum annual rate of ten percent in accordance with the provisions of *W. Va. Code*, 56-6-31 [1981].

8. The restriction contained in *W. Va. R. Civ. P.* 54(c) that "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment," does not apply where the judgment by default has been rendered as the result of the defaulting party's failure to obey an order of the circuit court to provide or permit discovery under *W. Va. R. Civ. P.* 37(b) *and the defaulting party otherwise appears at the subsequent trial on the issue of damages.*

McHugh, Justice:

These actions, No. 16252 and No. 16257, involving the appellants, Inland Mutual Insurance Company (hereinafter "Inland Mutual") and Camden Fire Association (hereinafter "Camden Fire"), respectively, contain similar issues and have been consolidated for the purpose of resolution of those issues.

I

A. INLAND MUTUAL

The action involving Inland Mutual is before this Court upon appeal from an order entered June 19, 1983, by the

Circuit Court of McDowell County in which that court denied a motion of Inland Mutual to set aside a default judgment obtained against it by Luther F. Bell, the appellee, for $53,491.85 in compensatory damages and $25,000 in punitive damages plus interest and costs.

In May 1967, the appellee was injured when he fell from the back of a truck driven by Kenny West and owned by his father, Ozie West. The appellee commenced a civil action against Kenny and Ozie West, however, Kenny West was residing in New Jersey. In February, 1975, service of process was made upon Kenny West but no timely answer was filed. The circuit court entered a default judgment against Kenny West. The court also addressed the issue of the father's liability for the accident. In an order entered on February 23, 1978, Ozie West was dismissed from the action with prejudice. The court, however, entered judgment against Kenny West for $35,000 in compensatory damages plus costs and interest at an annual rate of six percent.

In *Bell v. West*, —— W. Va. ——, 284 S.E.2d 885 (1981), this Court affirmed the judgment of the circuit court dismissing Ozie West from the action by refusing to extend liability to the father under the family purpose doctrine because of the attenuated connection between Kenny and Ozie West. This Court further affirmed the default judgment against Kenny West. In so doing, we noted existence of *W. Va. Code*, 17D-4-12(b)(2) [1959], that requires all motor vehicle liability insurance policies issued in this State to contain a provision making anyone using an insured vehicle with the express or implied permission of the named insured, an additional insured." 284 S.Ed.2d at 887 n.1.

The record indicates that soon thereafter the appellee contacted Inland Mutual's counsel by letter and requested Inland Mutual to pay the judgment, including interest and costs, against Kenny West. In September, 1982, the

appellee filed a complaint in the Circuit Court of McDowell County against Inland Mutual under *W. Va. Code*, 17D-4-12(b)(2) [1959], alleging that the insurance company wilfully failed to pay the judgment against Kenny West and demanding compensatory and punitive damages. Inland Mutual, by counsel, answered the complaint and denied liability beyond a $10,000 policy limit and asserted defenses to the original personal injury suit against Kenny West.

Approximately one month later, the appellee served upon Inland Mutual interrogatories that were not answered. In February, 1983, the appellee moved the circuit court to compel Inland Mutual to answer the interrogatories. In an order entered on February 4, 1983, the circuit court ordered the appellant to answer the interrogatories "by February 14, 1983 or all defenses of the defendant will be ordered stricken and judgment will be granted to the plaintiff on his pleadings." The interrogatories remained unanswered in contravention of the court's order and in April, 1983, the appellee moved the circuit court to strike the appellant's pleadings under *W. Va. R. Civ. P.* 37(b) and enter default judgment for the appellee. After hearing argument of counsel, the court, in an order entered May 2, 1983, struck the appellant's pleadings, and granted the appellee a judgment by default.

At a jury trial on the issue of damages, the appellee presented four witnesses, one of whom was the appellee. The jury awarded the appellee the amount of the original judgment against Kenny West of $35,000, prejudgment interest upon that amount at an annual rate of 10% from the date of the original award, February 23, 1978, totalling $18,491.85, and $25,000 in punitive damages: a total award of $78,491.85 plus interest and costs. The circuit court denied the appellant's motion to set aside the judgment.

B. CAMDEN FIRE

The case involving Camden Fire is before us upon appeal from an order of the Circuit Court of McDowell County, entered on December 21, 1983, in which that court denied the appellant's motion under *W. Va. R. Civ. P.* 60 (b) to set aside a default judgment obtained against it by Lonnie Justice, the appellee, for $61,276.16 in compensatory damages and $300,000 in punitive damages plus interest and costs.

In August, 1979, the appellee obtained fire insurance from Camden Fire upon real property titled in the name of his son. In 1981, the property was destroyed by fire, however, upon investigation, Camden Fire refused to pay the appellee the benefits under the policy. Camden Fire filed an action for declaratory judgment in the Circuit Court of McDowell County to determine the existence of an insurable interest in the property by the appellee.

The appellee answered the complaint and asserted a counterclaim against Camden Fire for the loss to the property under the terms of the policy. He also joined as a third-party defendant the insurance brokerage firm through which the insurance was purchased. In the counterclaim, the appellee demanded $63,900 in compensatory damages and $25,000 in punitive damages plus interest and costs.

Approximately one year later, the appellee served interrogatories upon Camden Fire and the third-party defendant. Camden Fire failed to answer the interrogatories. The appellee moved the circuit court to compel Camden Fire to answer the interrogatories and in an order entered on February 4, 1983, the appellant was ordered to answer such interrogatories "by February 14, 1983, or judgment will be entered against the plaintiff. . . ." The interrogatories remained unanswered and in April, 1983, the appellee moved the circuit court to strike the appellant's pleadings. In an order entered on May 2,

1983, the court granted the appellee a default judgment and dismissed from the action the insurance broker.

A jury trial was held to determine damages. The jury returned a verdict for $61,276.16 in compensatory damages and $300,000 in punitive damages. The judgment order of the circuit court indicates that the appellee moved the court pursuant to *W. Va. R. Civ. P.* 15(b) to amend the demand for judgment in the counterclaim to reflect an increased demand for punitive damages in the amount of $300,000. The motion was granted and the court awarded the appellee total damages in the amount of $361,276.16 plus interest and costs.

II

A. RULE 37(b) DISCOVERY SANCTIONS

A common issue presented by the two cases now before us involves the circuit court's rendering of judgments by default against the appellants as sanctions for their failure to comply with the orders compelling discovery. *W. Va. R. Civ. P.* 37(b), provides in pertinent part:

> (2) If a party or an officer, director, or managing agent of a party or a person designed under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . .
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. . . .[1]

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[1] The spectrum of other sanctions available to a circuit court under Rule 37(b)(2) is as follows:

W. Va. R. Civ. P. 37 is virtually identical to Rule 37 of the Federal Rules of Civil Procedure. *See Chandos, Inc. v. Samson*, 150 W. Va. 428, 432, 146 S.E.2d 837, 840 (1966); *see also N.C. v. W.R.C.*, —— W. Va. ——, 317 S.E.2d 793 n. 5 (1984).

It should first be established that the imposition of sanctions by a circuit court under *W. Va. R. Civ. P.* 37(b) for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642, 96 S. Ct. 2778, 2780, 49 L. Ed. 2d 747, 751 (1976). *See generally* C. Wright & A. Miller, *Federal Practice and Procedure*: Civil 2d § 2284 (Supp. 1983).

The striking of pleadings and the rendering of a judgment by default under Rule 37(b)(2)(C) are considered

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(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

. . . .

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

the harshest sanctions for the failure to comply with an order compelling discovery. *Chandos, Inc. v. Samson, supra.* In *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958), the Supreme Court of the United States reversed the dismissal of a complaint for a party's failure to obey a district court's order to produce certain banking documents located in Switzerland. The party argued that production of the document could have led to violations of Swiss law and possible criminal sanctions. The records were eventually confiscated by the Swiss government. The Court in *Rogers* stated:

> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey v. Elliot, 167 U.S. 409, and Hammond Packing Co. v. Arkansas, 212 U.S. 322. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.

357 U.S. at 209, 78 S. Ct. at 1094, 2 L. Ed. at 1265. Based partly upon constitutional considerations, the Court in *Rogers* held "that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." 357 U.S. at 212, 78 S. Ct. at 1096, 2 L. Ed. 2d at 1267.

The language of *Rogers* has consistently been interpreted to require some evidence of willfulness, contumacy

or bad faith on the part of the disobedient party in order to support the imposition of these severe sanctions. *See Chandos, Inc. v. Samson, supra. See generally* 4A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 37.03 [2.-5] at 37-78 (Cum. Supp. 1984-85). As the United States Court of Appeals for the Second Circuit noted in *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1067 (2d Cir. 1979), however, "the appellate cases commonly cited for this proposition hold only that dismissal is an abuse of discretion where failure to comply was not the result of the *fault* of any party." (emphasis added). The court in *Cine Forty-Second Street Theatre Corp.* affirmed the rendering of a default judgment against a disobedient party where "gross professional negligence" had been found on the part of the party's counsel. *See also Corchado v. Puerto Rico Marine Management, Inc.*, 665 F.2d 410 (1st Cir. 1981), *cert. denied*, 459 U.S. 826 (1982); *Affanato v. Merrill Brothers*, 547 F.2d 138 (1st Cir. 1977). *But see Edgar v. Slaughter*, 548 F.2d 770 (8th Cir. 1977).

In *Cine Forty-Second Street Theatre Corp.*, the court set forth the three-fold purpose of the sanctions contained in Rule 37(b). The court stated:

> Preclusionary orders ensure that a party will not be able to profit from its own failure to comply. *Dellums v. Powell*, 184 U.S. App. D.C. 339, 566 F.2d 231 (1977). Rule 37 strictures are also specific deterrents and, like civil contempt, they seek to secure compliance with the particular order at hand. *Robison v. Transamerica Ins. Co.*, 368 F.2d 37 (10th Cir. 1966). Finally, although the most drastic sanctions may not be imposed as 'mere penalties,' *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909); *see Hovey v. Elliot*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897), courts are free to consider the general deterrent effect their orders may have on the instant case and

> on other litigation, provided that the party on whom they are imposed is, in some sense, at fault. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curiam); *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).[2]

602 F.2d at 1066. *See also United States v. Sumitomo Marine & Fire Ins. Co., Ltd.*, 617 F.2d 1365 (9th Cir. 1980).

As a general rule, the rendering of judgment by default as a sanction under Rule 37(b) should be used sparingly and only in extreme situations. *See Affanato v. Merrill Brothers*, *supra* at 140; *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 488 (S.D. Fla. 1984). As the court stated in *Affanato*:

> The essential reason for the traditional reluctance of the courts to default a party is the 'policy of the law favoring the disposition of cases on their merits.'

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[2] The Court stated in *National Hockey League*, *supra*:

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.
>
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

427 U.S. at 642-43, 96 S. Ct. at 2780-81, 49 L. Ed. 2d at 751.

Richman v. General Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971) (citing cases).

> At the same time, however, in considering whether default is an appropriate sanction other factors must also be borne in mind, such as 'the time and energies of our courts and the rights of would-be litigants awaiting their turns to have other matters resolved.' *Von Poppenheim v. Portland Boxing & Wrestling Commission*, 442 F.2d 1047, 1054 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039, 92 S.Ct. 715, 30 L.Ed.2d 731 (1972).

Id. (footnote omitted). The sanctions available to the circuit court "must be weighed in light of the full record in the case. . . ." *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d at 1068; *see National Hockey League v. Metropolitan Hockey Club*, 427 U.S. at 642, 96 S. Ct. at 2780, 49 L. Ed. 2d at 750.

In view of the foregoing, we hold that the striking of pleadings and the rendering of judgment by default against a party as sanctions under *W. Va. R. Civ. P.* 37(b) for that party's failure to obey an order of a circuit court to provide or permit discovery may be imposed by the court where it has been established through an evidentiary hearing and in light of the full record before the court that the failure to comply has been due to willfulness, bad faith or fault of the disobedient party and not the inability to comply and, further, that such sanctions are otherwise just.

It is also necessary for us to identify the evidentiary framework to be employed during a hearing before a court properly considering the imposition of sanctions under Rule 37(b). Obviously, the party seeking sanctions under Rule 37(b) has the burden of establishing noncompliance with the circuit court's order to provide or permit discovery. Once the noncompliance is established,

the burden is upon the disobedient party to avoid the sanctions sought under Rule 37(b) by showing that the inability to comply with the court's order or special circumstances render the particular sanctions unjust. *See Fed. R. Civ. P.* 37(b) advisory committee notes; *see also Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 784 (9th Cir. 1983); *David v. Hooker, Ltd.*, 560 F.2d 412 (9th Cir. 1977); *In re Special Delivery, Inc.*, 16 B.R. 714 (N.D. Ohio 1982); syl. pt. 2, *Ward v. Hester*, 32 Ohio App. 2d 121, 288 N.E.2d 840 (1972), *aff'd*, 36 Ohio St. 2d 38, 303 N.E.2d 861 (1973). As the court stated in *Falstaff Brewing Corp. v. Miller Brewing Co.*, *supra* at 785: "The party against whom an award of expenses is sought has the burden of showing the special circumstances that make his or her failure to comply substantially justified."

B. DEFENSES OF APPELLEES RELATING TO SANCTIONS

Both appellants dispute the assertions of the appellees on appeal that they acted willfully, in bad faith or were otherwise at fault when they failed to answer the interrogatories pursuant to the circuit court's orders. The appellants claim that their counsel failed to inform them that interrogatories had been served upon them or that orders had been entered compelling their answers.[3] The appellants contend that if they had known about the interrogatories or the orders compelling discovery they would have answered the interrogatories because they had what they assert are meritorious defenses to the actions and would not, therefore, have risked liability with judgments by default.

Confronted with a similar argument, the court in *Cine Forty-Second Street Theatre Corp.* stated:

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[3] It should be noted that during their respective litigations, both appellants were represented by the same counsel in the circuit court and both appellees were represented by the same counsel.

> Considerations of fair play may dictate that courts eschew the harshest sanctions provided by Rule 37 where failure to comply is due to a mere oversight of counsel amounting to no more than simple negligence, *Affanato, supra*, 547 F.2d at 141; *see SEC v. Research Automation Corp.*, 521 F.2d 585 (2d Cir. 1975) (dictum). But where gross professional negligence has been found—that is, where counsel clearly should have understood his duty to the court—the full range of sanctions may be marshalled. Indeed, in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where, as in this case, they are clearly warranted.
>
> A litigant chooses counsel at his peril, *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), and here, as in countless other contexts, counsel's disregard of his professional responsibilities can lead to extinction of his client's claim.

602 F.2d at 1068. In *Corchado v. Puerto Rico Marine Management, Inc., supra* at 413, the United States Court of Appeals for the First Circuit, reaching a similar conclusion, noted: "We realize that we are visiting the sins of the attorneys upon the client, but this is an unavoidable side effect of the adversary system." [4]

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[4] In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962), the Supreme Court of the United States affirmed the dismissal of an action by a district court under *Fed. R. Civ. P.* 41(b), upon the court's own motion, for failure of the plaintiff to prosecute. The Court found that the lower court had not abused its discretion when it dismissed the action, in part, because the plaintiff's counsel failed to appear for a hearing. The Court found that intentional dilatory tactics could be inferred from the overall behavior of the party. With respect to the action of the plaintiff's counsel the Court stated:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct

We agree with the above reasoning and hold that where a party's counsel intentionally or with gross negligence fails to obey an order of a circuit court to provide or permit discovery, the full range of sanctions under *W. Va. R. Civ. P.* 37(b) are available to the court and the party represented by that counsel must bear the consequences of counsel's actions. The relative responsibilities of the disobedient party and its counsel in accordance with the

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> imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' *Smith v. Ayer*, 101 U.S. 320, 326.

370 U.S. at 633-34, 82 S. Ct. at 1390, 8 L. Ed. 2d at 740.

But see *Edgar v. Slaughter*, 548 F.2d 770, 773 (8th Cir. 1977), wherein the United States Court of Appeals for the Eighth Circuit balanced the wide latitude a trial court must possess to control pretrial discovery with the concept "that in our system of justice the opportunity to be heard is a litigant's most precious right and should be sparingly denied." The court continued:

> Prior to dismissal or entering a default judgment, fundamental fairness should require a district court to enter an order to show cause and hold a hearing, if deemed necessary, to determine whether assessment of costs and attorney fees or even an attorney's citation for contempt would be a more just and effective sanction. Dismissal and entry of a default judgment should be the rare judicial act. When noncompliance is the result of dilatory conduct by counsel, the courts should investigate the attorney's responsibility as an officer of the court and, if appropriate, impose on the client sanctions less extreme than dismissal or default, unless it is shown that the client is deliberately or in bad faith failing to comply with the court's order.

See also Cine Forty-Second Street Theatre Corp., supra at 1069 (Oakes, J., concurring) ("It would be with the greatest reluctance . . . that I would visit upon the client the sins of counsel, absent client's knowledge, condonation, compliance, or causation"); *Hawkins v. Fulton County*, 96 F.R.D. 416, 422 (N.D. Ga. 1982).

foregoing standards is an issue to be raised by the appropriate party before a circuit court when considering a motion for the imposition of sanctions under Rule 37(b). We now turn to an examination of the individual cases.

This Court held in syllabus point 1 of *Intercity Realty Co. v. Gibson*, 154 W. Va. 369, 175 S.E.2d 452 (1970):

> A default judgment obtained in accordance with the provisions of Rule 55(b), West Virginia Rules of Civil Procedure, is a valid and enforceable judgment and a motion to set aside such judgment will not be granted unless the movant shows good cause therefor as prescribed in Rule 60(b) of the aforesaid Rules of Civil Procedure.

See W. Va. R. Civ. P. 55(c); *see also* syl. pt. 3, *Coury v.* Tsapis, —— W. Va. ——, 304 S.E.2d 7 (1983); syl. pt. 1, *Cordell v. Jarrett*, —— W. Va. ——, 301 S.E.2d 227 (1982); syl. pt. 1, *Hamilton Watch Co. v. Atlas Container, Inc.*, 156 W. Va. 52, 190 S.E.2d 779 (1972).

We further held in syllabus point 3 of *Intercity Realty Co. v. Gibson, supra*: "A motion to vacate a default judgment is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." *See* syl. pt. 3, *McDaniel v. Romano*, 155 W. Va. 875, 190 S.E.2d 8 (1972); *see also* syl. pt. 5, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974) (a motion to vacate a judgment pursuant to Rule 60(b) is generally addressed to the sound discretion of the court).

The records are clear in both cases that due process was satisfied when Inland Mutual and Camden Fire were afforded opportunities for evidentiary hearings upon the appellees' motions for sanctions under Rule 37(b). The records are silent, however, as to whether either of the appellants requested such hearings. The records of both cases reveal that the circuit court heard argument of counsel.

In the action involving Inland Mutual there appears to have been no attempt by the appellant to preserve a record regarding the asserted error of the circuit court on this issue. Inland Mutual, by counsel, objected to the entry of the default judgment but it failed to develop at an evidentiary hearing the circumstances of that default judgment or otherwise preserve a record of the proceedings before the court. The record before us is clear that the appellants' counsel appeared at all hearings before the circuit court.

Furthermore, unlike Camden Fire, Inland Mutual failed to seek relief from the default judgment through a Rule 60(b) motion in accordance with the well established standards set forth above. As we noted in *N.C. v. W.R.C.*, —— W. Va. ——, 317 S.E.2d 793, 795 (1984): "The primary vehicle by which a party may seek relief from a judgment or order in a circuit court is contained in Rule 60(b) of the West Virginia Rules of Civil Procedure." By utilizing Rule 60(b), Inland Mutual could have developed a record on the reasons for the failure to answer the interrogatories.

It is axiomatic that this Court "can consider only those matters in the record in determining whether the court abused its discretion." *Evans v. Huntington Publishing Inc.*, —— W. Va. ——, 283 S.E.2d 854, 855 (1981); *see also Thornton v. C.A.M.C.*, —— W. Va. ——, 305 S.E.2d 316, 320-21 (1983); *Hylton v. Provident Life & Accident Insurance Co.*, 159 W. Va. 728, 226 S.E.2d 453 (1976). Based upon the record before us, the circuit court did not abuse its discretion when it rendered the default judgment as a result of Inland Mutual's failure to comply with the court's order compelling discovery; nor was there an abuse of discretion on the refusal to set the default judgment aside.[5]

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[5] It should be emphasized that the record before us clearly indicates that Inland Mutual has been involved in this litigation since

In the action involving Camden Fire, the appellant moved the circuit court to set aside the default judgment pursuant to Rule 60(b) and requested, *inter alia*, an evidentiary hearing to determine the propriety of the default judgment. We believe that the circuit court abused its discretion when it denied Camden Fire an opportunity to develop a record in that regard. We, therefore, reverse the Circuit Court of McDowell County on this issue and remand this case to that court for a hearing to develop the facts surrounding the rendering of the default judgment against Camden Fire consistent with this opinion.

There are additional matters from the individual cases that remain to be resolved. We will first discuss other assignments of error from the action involving Inland Mutual.

III

Inland Mutual also contends that the circuit court erred when it allowed the jury to consider prejudgment interest at an annual rate of ten percent on the judgment against it which resulted from the verdict against Kenny West on February 23, 1978. The appellant does not question the propriety of the award of prejudgment interest or the period of time for which it was calculated but does challenge the annual rate of interest the jury was allowed to consider. The appellant asserts that the ten percent annual interest rate should not have been allowed because the original judgment against Kenny West of $35,000 was accruing, by order of the court, postjudgment interest at an annual rate of six percent.

Luther Bell, the appellee, filed the complaint against Kenny and Ozie West in 1967. Despite the judgment rendered against one of Inland Mutual's insureds many years ago, the appellee remains uncompensated for his injuries. That delay is disturbing. Inland Mutual's actions in this case, in short, are certainly not noteworthy nor examples to be followed by other insurance companies.

In 1981, the legislature amended *W. Va. Code*, 56-6-31 [1981], which codified the availability of prejudgment interest in actions "[e]xcept where it is otherwise provided by law. . . ." [6] That statutory provision had previously only provided for postjudgment interest. The 1981 amended version of that statute provides, in relevant part, as follows:

> [I]f the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of such special or liquidated damages shall bear interest from the date the right to bring the same shall have accrued, as determined by the court. Special damages includes lost wages and income, medical expenses, damages to tangible personal property, and similar out-of-pocket expenditures, as determined by the court.

The amended statute further increased the maximum annual rate on postjudgment and prejudgment interest from six percent to ten percent. It provides: "The rate of interest shall be ten dollars upon one hundred dollars per annum, and proportionately for a greater or lesser sum, or for a longer or shorter time, notwithstanding any

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[6] *W. Va. Code*, 56-6-31 [1981], is a partial codification of this Court's holding in *Bond v. City of Huntington*, —— W. Va. ——, 276 S.E.2d 539 (1981). *See Kirk v. Pineville Mobile Homes, Inc.*, —— W. Va. ——, 310 S.E.2d 210, 212 n. 1 (1983). In *Bond*, we extended the traditional availability of prejudgment interest in actions based on contract, *W. Va. Code*, 56-6-27 [1931], to actions based on tort. In syllabus point 5 of *Bond* we held that "[a] rule permitting additional damages by way of compensatory interest on pecuniary losses incurred prior to trial in personal injury actions as well as wrongful death claims is consistent with our prior case law and our liberal interest statute." In both contexts, prejudgment interest is available to a litigant as part of compensatory damages "where there is an ascertainable pecuniary loss. . . ." 276 S.E.2d at 548. *See also* syl. pt. 1, *Kirk v. Pineville Mobile Homes, Inc.*, *supra*; syl. pt. 12, *Ilosky v. Michelin Tire Corp.*, —— W. Va. ——, 307 S.E.2d 603 (1983). *See generally* C. McCormick, *Handbook on the Law of Damages* § 54 at 213 (1935).

other provisions of law." Prior to *W. Va. Code*, 56-6-31 [1981], the maximum legal rate of interest was six percent per annum. *W. Va. Code*, 47-6-5(a) [1974].

With respect to the rate of interest to be applied to the amount sought from Inland Mutual the circuit court erred in allowing the application of ten percent interest on the sum back to February 23, 1978, the date the verdict was rendered against Kenny West. It is a general rule, as stated in McCormick, *supra* § 52 at 211, that "[i]f the statutory rate is changed after the cause of action accrues, the interest should be allowed at the old rate before, and at the new after, the altering enactment takes effect." *See Coastal Industrial Water Authority v. Trinity Portland Cement Division, General Portland Cement Co.*, 563 S.W.2d 916 (Tex. 1978); *Haag v. Pugh*, 545 S.W.2d 22, 24 (Tex. Civ. App. 1976). *See generally* 25 C.J.S. *Damages* § 92(1) (Cum. Supp. 1984).

The 1981 amendment to *W. Va. Code*, 56-6-31 [1981] was passed by the legislature on April 6, 1981 and became effective on July 5, 1981, 90 days from its passage. 1981 W. Va. Acts c. 205. We therefore hold that prejudgment interest accruing on amounts as provided by law prior to July 5, 1981, is to be calculated at a maximum annual rate of six percent under *W. Va. Code*, 47-6-5(a) [1974], and thereafter, at a maximum annual rate of ten percent in accordance with the provisions of *W. Va. Code*, 56-6-31 [1981].

Accordingly, the judgment of the Circuit Court of McDowell County is reversed on the interest issue as to Inland Mutual, and this case is remanded to that court for recalculation of the prejudgment interest due the appellee consistent with the principles set forth above.

Inland Mutual's petition for appeal addresses other aspects of the action below including errors concerning the statute of limitations, the propriety of the punitive dam-

ages, evidentiary issues and instructions to the jury during the trial on damages. With regard to these contentions we find no error on the part of the circuit court.

IV

In the action involving Camden Fire, the remaining assignment of error concerns the amounts of punitive damages awarded to the appellee by the jury. In his counterclaim, the appellee demanded, *inter alia*, $25,000 in punitive damages. The jury, however, returned a verdict for punitive damages in the amount of $300,000. Camden Fire contends that under *W. Va. R. Civ. P.* 54(c) the circuit court erred when it granted the appellee's motion after the verdict to amend its original demand for judgment in the counterclaim to reflect the increased award of punitive damages. Rule 54(c) provides, in pertinent part, as follows: "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."

There is disagreement among commentators and cases on the issue of whether an award of damages in a default judgment may exceed the original demand for judgment. The distinction between the two positions primarily lies in the type of default judgment that has been rendered. In *Sarlie v. E.L. Bruce Co.*, 265 F. Supp. 371, 377 (S.D.N.Y. 1967), the United States District Court for the Southern District of New York stated that "[j]udgments by default are of two general kinds: (1) for want of appearance, and (2) for failure to plead or to otherwise defend as provided by the rules, although the party has initially appeared in the action."

The first position advocates strict application of Rule 54(c) to all default judgments regardless of the manner in which they arise. This position is advanced in 10 C. Wright, A. Miller & M. Kane, *Federal Practice &*

Procedure: Civil 2d § 2663 (Supp. 1983), when it states as follows:

> The theory of this provision is that once the defending party receives the original pleading he should be able to decide on the basis of the relief requested whether he wants to expend the time, effort, and money necessary to defend the action. It would be fundamentally unfair to have the complaint lead defendant to believe that only a certain type and dimension of relief was being sought and then, should he attempt to limit the scope and size of the potential judgment against him by not appearing or otherwise defaulting, allow the court to give a different type of relief or a larger damage award. * * * In sum, then, a default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded. A judgment in a default case that awards relief that either is more than or different in kind from that requested originally is null and void and defendant may attack it collaterally in another proceeding.

Id. at 139-42 (footnotes omitted).

The above commentators recognize that "[a]lthough this portion of Rule 54(c) appears relatively simple to apply, one difficult, and as yet not definitively resolved, problem is presented when judgment is rendered in a situation in which the party appeared but subsequently failed to plead or otherwise defend the action." *Id.* at 142. The commentators concluded, however, that "[t]he absence of any words of qualification or differentiation in the first sentence of Rule 54(c) indicates that the provision is intended to apply to all cases of default, whether they involve a party who 'has appeared' or one 'in default for failure to appear.'" *Id.* at 142-3 (footnotes omitted). *See Fong v. United States*, 300 F.2d 400, 413 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962);

see also Securities and Exchange Commission v. Wencke, 577 F.2d 619, 623 (9th Cir.), *cert. denied*, 439 U.S. 964 (1978); *Henry v. Sneiders*, 490 F.2d 315, 317 (9th Cir.), *cert. denied*, 419 U.S. 832 (1974).

The second approach to Rule 53(c) was pioneered by the United States Court of Appeals for the Eighth Circuit in *Peitzman v. City of Illmo*, 141 F.2d 956 (8th Cir.), *cert. denied*, 323 U.S. 718 (1944). The court in *Peitzman* stated:

> Rule 54(c) apparently is a general rule applicable in case of a non-appearing defendant in complete default. On a hearing on the question of damages, under Rule 55(b) a defendant, though in default, is in court on a hearing limited to the question of the amount of damages, to the same extent that he is in court in a trial on the merits, and we think amendments at the trial are as appropriate in the one case as in the other. Amendments to a pleading may be allowed at the hearing on damages as to the relief prayed, subject to the right of the defendant, if taken by surprise or put to a disadvantage, to ask for a continuance or for time in which to prepare to meet the enlarged claim. (citations omitted). In general, it may be said that a change in the amount prayed for is not of vital importance, as the prayer for relief is in fact no part of the claim or cause of action stated.

141 F.2d at 962. *See Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 78-79 (2d Cir. 1971), *rev'd on other grounds, Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973); *Sarlie v. E.L. Bruce Co., supra* at 377-78; *see also Growth Properties, Inc. v. Klingbeil Holding Co.*, 419 F. Supp. 212, 220-21 (D. Md. 1976). *See generally* 6 J. Moore & J. Lucas, *Moore's Federal Practice* § 54.61 at 1232-33 (Cum. Supp. 1984-85); Clark &

Moore, *A New Federal Civil Procedure II. Pleadings and Parties*, 44 Yale L. J. 1291, 1303 (1935).[7]

In *Trans World Airlines, Inc. v. Hughes, supra*, the United States Court of Appeals for the Second Circuit was presented with facts similar to the ones in the case involving Camden Fire. The court in *Trans World Airlines, Inc.* concluded:

> Although the authorities do not appear to be in agreement . . . we are of the view that there is no sound basis for restricting TWA to the precise damages originally sought in a case where damages alleged were unliquidated, and where defendant did not default by non-appearance, but rather because of non-compliance with discovery procedures, and indeed was granted a full trial on the question of

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[7] Professor Moore initially advocates a broader view than that expressed in *Peitzman v. City of Illmo, supra.* In his treatise he states as follows:

> It is arguable that, as a matter of policy, the limitations of the Rule should apply only to a judgment by default for want of appearance and not to a default judgment where the defendant has appeared. In the latter situation a party who has put in an appearance is entitled to receive notice of all proceedings in the action, including a written notice of the application for judgment at least 3 days prior to the hearing on such application. . . . [This factor] would warrant a Rule authorizing the court to render such a judgment as the complainant proved himself entitled to, no matter what the initial pleading may have requested. But Rule 54(c) does not go that far; it makes no distinction in the type of judgment by default; and hence all judgments by default are subject to its limitations.
>
> Where, however, the defendant appears at the hearing on the application for judgment, the court, in the exercise of a sound discretion, may permit the claimant to amend his prayer for relief. This is as it should be, for as earlier noted Rule 54(c) is to be read in conjunction with certain related rules, and one of these is Rule 15 dealing liberally with amendments.

6 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 54.61 at 1231-33.

> damages actually caused by the allegation established by its default.

Id. at 78.

We agree with the reasoning espoused in *Trans World Airlines, Inc., supra,* and hold that the restriction contained in *W. Va. R. Civ P.* 54(c) that "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment," does not apply where the judgment by default has been rendered as the result of the defaulting party's failure to obey an order of the circuit court to provide or permit discovery under *W. Va. R. Civ. P.* 37(b) *and the defaulting party otherwise appears at the subsequent trial on the issue of damages.* The circuit court, therefore, did not err when it granted the appellee's motion to increase his original demand for judgment.

Based upon the foregoing, the orders of the Circuit Court of McDowell County with respect to both cases now before us are affirmed in part, reversed in part and remanded to that court for further proceedings consistent with this opinion.

Affirmed in part;
reversed in part
and remanded.

BROTHERTON, Justice dissenting:

While I agree with most of the majority opinion, I must disagree with their interpretation of Rule 54(c) in Syl. pt. 8 as it applies to default judgments in cases where a party has appeared and the default judgment is issued as a sanction. The rule mandates that "[a] judgment by default *shall not* be different in kind from or *exceed in amount* that prayed for in the demand for judgment." (Emphasis added.) The meaning of the phrase is clear and quite apparent: that default judgments shall not exceed the amount prayed for in the demand for judgment. In interpreting a rule the Court should follow the same rules as when it is construing a statute. One of the most honored of these rules is that the Court should not read a different meaning into a statute where the plain meaning is clear. *See, e.g., Crockett v. Andrews*, 153 W.Va. 714, 718, 172 S.E.2d 384, 386-87 (1970). Therefore, whenever a default judgment is entered it should not be allowed to exceed the amount in the demand for judgment. Whether the default judgment was entered as a sanction or whether or not the party appeared is irrelevant.

Because the majority gives an excellent discussion of both views of the interpretation of Rule 54(c), I shall not rehash the matter here. Despite their thorough analysis, however, I feel the majority has reached the wrong conclusion and I, therefore, respectfully note my dissent.

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 11th day of June, 1985, the following order was made and entered, to-wit:

16257

CAMDEN FIRE ASSOCIATION,
Plaintiff Below, Appellant

vs.

LONNIE JUSTICE,
Defendant Below, Appellee

The Court having maturely considered the petition for rehearing and reargument filed in the captioned case is of opinion to and doth hereby, deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed. Justice McGraw absent.

A True Copy

Attest: /s/ George W. Singleton
Clerk Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of December, 1983, the following order was made and entered, to-wit:

CAMDEN FIRE ASSOCIATION, a corporation

vs.

LONNIE JUSTICE

This day came the petitioner, Camden Fire Insurance Association, by James R. Watson, its attorney, and presented to the Court its motion with exhibits, for an extension of time within which to apply for an appeal to this Court from the order of the Circuit Court of McDowell County on May 2, 1983. Upon consideration whereof, the Court is of opinion to and doth grant said motion. It is therefore considered and ordered that the time within which to file an application for appeal herein be, and the same is hereby, extended to February 2, 1984; all of which is ordered to be certified to the Circuit Court of McDowell County.

A True Copy

Attest: /s/ George W. Singleton
Clerk Supreme Court of Appeals

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE INSURANCE ASSOCIATION,
a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant and
Third-Party Plaintiff,

vs.

LEVISA INSURANCE AGENCY, INCORPORATED,
a Corporation,
Third-Party Defendant.

ORDER

On the 20th day of December, 1983, came the plaintiff, Camden Fire Insurance Association, by counsel, James R. Watson, the defendant and third-party plaintiff, Lonnie Justice, in person and by counsel, G. David Brumfield, and the thirty-party defendant, Levisa Insurance Agency, Incorporated, by counsel, Lawrence E. Morhous, without formal notice of said hearing and by special appearance of counsel for said third-party defendant, pursuant to the written Motions of the plaintiff pursuant to the written Motions of the plaintiff pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure to set aside the Orders entered herein on May 2, 1983, June 1, 1983, and June 29, 1983. Whereupon, counsel for the plaintiff tendered and asked leave of the Court to file an Affidavit of Chris Patton in support of its said Motion and for leave to file Answers of Camden Fire Insurance Association to the Interrogatories of Lonnie Justice. Counsel for the defendant

and third-party plaintiff, Lonnie Justice, did not object to the filing of said Affidavit but did object to the filing of said Answers to Interrogatories. Whereupon, the Court proceeded to hear arguments of counsel and after considering the same doth overrule all Motions of the plaintiff, Camden Fire Insurance Association.

It is, therefore, ADJUDGED and ORDERED that the Motion of the plaintiff, Camden Fire Insurance Association, a corporation, to set aside the Orders entered herein on May 2, 1983, June 1, 1983, and June 29, 1983, pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, be and the same is hereby denied. It is further ORDERED that the Motion of the plaintiff, Camden Fire Insurance Association, for leave to file the Affidavit of Chris Patton and Answers to the Interrogatories of Lonnie Justice be, and the same is hereby denied.

Whereupon, the plaintiff, Camden Fire Insurance Association, by counsel, pursuant to Rule 62 of the West Virginia Rules of Civil Procedure, moved the Court to enter a stay of execution on the Judgment Order entered herein on June 1, 1983, which motion the Court doth sustain. It is, accordingly, ADJUDGED and ORDERED that a stay of execution be, and the same is hereby granted until the expiration of the appeal period to said Order of June 1, 1983.

Counsel for the plaintiff hereby objects and excepts to the above rulings of the Court.

ENTER this 21st day of December, 1983.

/s/ Jack Marinari
Judge

APPROVED:

/s/ James R. Watson
JAMES R. WATSON
Attorney for Plaintiff

/s/ G. David Brumfield
G. DAVID BRUMFIELD
Attorney for Defendant

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

THE CAMDEN FIRE INSURANCE ASSOCIATION,
a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant.

ORDER

On the 27th day of June, 1983, came the plaintiff, by J. Strother Crockett, its attorney, and also came the defendant, by G. David Brumfield, his attorney. And, thereupon, this cause came on for hearing upon the written Motion of the plaintiff to set aside the jury verdict returned herein on the 1st day of June, 1983, and to award the plaintiff a new trial, which motion the Court doth overrule and doth refuse to set aside the jury verdict and doth refuse to award the plaintiff a new trial, to which action and ruling by the Court the plaintiff, by counsel, excepted.

It is further ORDERED that this action be omitted from the docket of this Court.

ENTER this 29th day of June, 1983.

/s/ Jack Marinari
Judge

APPROVED:

/s/ S. Crockett
Attorney for Plaintiff

/s/ G. D. Brumfield
Attorney for Defendant

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

THE CAMDEN FIRE INSURANCE ASSOCIATION,
a Corporation,

Plaintiff,

vs.

LONNIE JUSTICE,

Defendant.

JUDGMENT ORDER

This action came on for trial before the Court and a Jury, Honorable Jack Marinari presiding, and the issue having been duly tried and the Jury, on June 1, 1983, having rendered a verdict for the defendant to recover of the plaintiff damages in the amount of $361,276.16.

It appearing that in the ad damnum clause of the defendant's Amended Counterclaim, the defendant, Lonnie Justice, demanded punitive damages against the plaintiff in the amount of $25,000.00, the said defendant, by counsel, thereupon moved the Court pursuant to Rule 15(b) of the West Virginia Rules of Civil Procedure to amend said ad damnum clause to conform to the evidence and to the findings of the Jury as evinced by the jury verdict, which motion the Court doth sustain. It is, accordingly, ADJUDGED and ORDERED that the ad damnum clause of the defendant, Lonnie Justice, is hereby amended so that the said ad damnum clause conforms to the evidence presented at trial with respect to the punitive damages of the defendant in the amount of $300,000.00.

It is, therefore, ADJUDGED and ORDERED that the defendant, Lonnie Justice, recover of and from the plain-

tiff, The Camden Fire Insurance Association, a Corporation, the sum of SIXTY-ONE THOUSAND TWO HUNDRED SEVENTY-SIX & 16/100 DOLLARS ($61,276.16) for compensatory damages, and the sum of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) for punitive damages, or a total of THREE HUNDRED SIXTY-ONE THOUSAND TWO HUNDRED SEVENTY-SIX & 16/100 DOLLARS ($361,276.16), with interest thereon at the rate of Ten Percent (10%) per annum from the 1st day of June, 1983, until paid, and his costs of action, including a statutory attorney's fee of Ten Dollars ($10.00).

The plaintiff excepts and objects to this Order.

All matters having been fully adjudicated, the Clerk is ORDERED to omit this action from the docket.

ENTER this 1st day of June, 1983.

/s/ Jack Marinari
Judge

APPROVED:

/s/ J. S. Crockett
J. STROTHER CROCKETT
Attorney for Plaintiff

/s/ G. D. Brumfield
G. DAVID BRUMFIELD
Attorney for Defendant

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant.

JURY VERDICT

We, the Jury, upon the issues joined between the Plaintiff and the Defendant find for the Defendant, Lonnie Justice, and against the Plaintiff, The Camden Fire Insurance Association, and assess his damages as follows:

Compensatory Damages	$ 61,276.16
Punitive Damages	300,000.00
Total Damages	$361,276.16

/s/ Douglas Hawkins
Foreman

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant,

vs.

LEVISA INSURANCE AGENCY, INCORPORATED,
a Corporation,
Third-Party Defendant.

ORDER

On this the 1st day of June, 1983, came the parties and their attorneys and the trial of this action was resumed pursuant to adjournment on the 31st day of May, 1983.

ORDER:

ENTER:

/s/ Jack Marinari
Judge

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant,

vs.

LEVISA INSURANCE AGENCY, INCORPORATED,
a Corporation,
Third-Party Defendant.

ORDER

The trial of this action being not completed on this day, and time for adjournment having arrived, the Court will stand adjourned until June 1, 1983, at 9:30 o'clock, a.m., when the trial of this action will resume.

ORDER:

ENTER:

/s/ Jack Marinari
Judge

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant and
Third-Party Plaintiff,

vs.

LEVISA INSURANCE AGENCY, INCORPORATED,
a Corporation,
Third-Party Defendant.

ORDER

On this the 31st day of May, 1983 came the parties, by their attorneys, and announced ready for trial.

Thereupon, a jury was drawn, empaneled, qualified and sworn in the manner provided by law.

It is, therefore, ordered that this case proceed to trial at this time.

ORDER:

ENTER:

/s/ Jack Marinari
Judge

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant and
Third-Party Plaintiff,

vs.

LEVISA INSURANCE AGENCY, INCORPORATED,
a Corporation,
Third-Party Defendant.

ORDER

On the 3rd day of May, 1983, came the defendant, by counsel, and moved the Court to continue the hearing on damages set for 1:30 P.M. on May 6, 1983, which motion is sustained.

It is, accordingly, ADJUDGED and ORDERED that the hearing on damages herein set for 1:30 P.M. and the 6th day of May, 1983, is hereby continued. It is further ORDERED that said hearing shall be set for a date certain at the regular docket setting for the May Term of this Court, which is to be on May 5, 1983.

And this cause is continued.

ENTER this 3rd day of May, 1983.

/s/ Jack Marinari
Judge

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant and
Third-Party Plaintiff,

vs.

LEVISA INSURANCE AGENCY, INCORPORATED,
a Corporation,
Third-Party Defendant.

ORDER

On the 26th day of April, 1983, came the plaintiff, Camden Fire Association, a Corporation, by counsel, J. Strother Crockett, the defendant and third-party plaintiff, Lonnie Justice, by counsel, G. David Brumfield, and the third-party defendant, Levisa Insurance Agency, Incorporated, a Corporation, by counsel, Lawrence E. Morhous, pursuant to the written Motion of the defendant and third-party plaintiff to strike the pleadings of the plaintiff herein for declaratory judgment and to grant the defendant judgment based on his Answer, Amended Answer, Counterclaim, and Amended Counterclaim against the plaintiff for failure of the plaintiff to comply with the Order of the Court entered herein on the 4th

day of February, 1983, which ordered the plaintiff to answer by February 14, 1983, fully, completely, and under oath the Interrogatories served on the plaintiff by the defendant on the 2nd day of December, 1982. After hearing arguments of counsel, the Court doth find that the plaintiff, Camden Fire Association, a Corporation, has failed to comply with the said Order of the Court entered herein on the 4th day of February, 1983, and has failed to answer any of the Interrogatories of the defendant served on plaintiff; that in the Third-Party Complaint filed by the third-party plaintiff against the third-party defendant, the third-party plaintiff sought alternative judgment against the third-party defendant in the event the Court granted the declaratory judgment originally filed by the plaintiff herein against the defendant and third-party plaintiff; that judgment for the defendant, Lonnie Justice, against the plaintiff, Camden Fire Association, a Corporation, renders moot the relief demanded in the said Third-Party Complaint. Therefore, the Court doth sustain the motion of the defendant.

It is, accordingly, ADJUDGED and ORDERED that the pleadings of the plaintiff, Camden Fire Association, a Corporation, are hereby stricken and judgment is hereby granted in favor of the defendant, Lonnie Justice, against the plaintiff, Camden Fire Association, based on the Answer, Amended Answer, Counterclaim, and Amended Counterclaim of the defendant for compensatory and punitive damages.

It is further ORDERED that the Third-Party Complaint of the defendant and third-party plaintiff, Lonnie Justice, is hereby dismissed as the relief demanded herein was conditional upon the plaintiff obtaining declaratory judgment against the defendant, and judgment having been granted for the defendant herein, said Third-Party Complaint is moot and the same is hereby ORDERED dismissed.

It is further ORDERED that a hearing to determine the amount of compensatory and punitive damages to which the defendant, Lonnie Justice, is entitled to recover against the plaintiff, Camden Fire Insurance Association, a Corporation, is set for 1:30 P.M. on the 6th day of May, 1983.

The plaintiff, by counsel, hereby objects and excepts to the above rulings of the Court.

ENTER this 2nd day of May, 1983.

/s/ Jack Marinari
Judge

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant and
Third-Party Plaintiff,

vs.

LEVISA INSURANCE AGENCY, INCORPORATED,
a Corporation,
Third-Party Defendant.

ORDER

On the 3rd day of February, 1983, came the defendant and third-party plaintiff, Lonnie Justice, by G. David Brumfield, his attorney, and the plaintiff, by J. Strother Crockett, its attorney. Whereupon, counsel for the defendant and third-party plaintiff orally moved the Court, pursuant to Rule 37 of the West Virginia Rules of Civil Procedure, to require the plaintiff to respond to the Interrogatories of the defendant and third-party plaintiff heretofore filed on the plaintiff. After considering the same, the Court doth sustain said motion.

It is, accordingly, ADJUDGED and ORDERED that the plaintiff answer said Interrogatories fully, completely, and under oath by February 14, 1983, or judgment will be entered against the plaintiff herein on the Amended Counterclaim of the defendant against the plaintiff.

ENTER this 4th day of February, 1983.

/s/ Jack Marinari
Judge

APPROVED:

/s/ J. S. Crockett
Attorney for Plaintiff

/s/ G. D. Brumfield
Attorney for Defendant
and Third-Party Plaintiff

IN THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

No. 16257

CAMDEN FIRE INSURANCE ASSOCIATION,
Appellant.

v.

LONNIE JUSTICE,
Appellee.

[Filed Aug. 19, 1985]

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Camden Fire Insurance Association, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of West Virginia denying Appellant's Petition for Rehearing and ordering that its order entered herein on April 11, 1985, affirming in part the orders of the Circuit Court of McDowell County, West Virginia, be made absolute and certified as directed.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ James R. Watson
JAMES R. WATSON
Attorney for
Camden Fire Ins. Association
Appellant.

IN THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

No. 15257

CAMDEN FIRE INSURANCE ASSOCIATION,
Appellant.

v.

LONNIE JUSTICE,
Appellee.

PROOF OF SERVICE—AFFIDAVIT

I, Karen L. Fisher, secretary for James R. Watson in the law office of Steptoe & Johnson, attorneys of record for Camden Fire Insurance Association, Appellant herein, depose and say that on the 20th day of August, 1985, I served a copy of the foregoing "Notice of Appeal to the Supreme Court of the United States" on Lonnie Justice, Appellee herein, by mailing a copy together with this Proof of Service, in a duly addressed envelope, with regular U.S. mail, postage prepaid, to C. David Brumfield, Drawer P, First National Bank Building, Welch, West Virginia 24801, counsel of record for Lonnie Justice.

/s/ Karen L. Fisher

Taken, subscribed and sworn to before me this the 20th day of August, 1985.

My commission expires: October 20, 1987

/s/ Jane Ellen Douglas
Notary Public

APPENDIX D

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, a corporation
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant.

[Filed Sept. 22, 1981]

COMPLAINT FOR DECLARATORY JUDGMENT
AND OTHER RELIEF

I

Plaintiff is a West Virginia Corporation engaged in the business of issuing policies of fire insurance, and its principal office is Wheeling, West Virginia. Defendant is a citizen and resident of Sandy River District, McDowell County, West Virginia.

II

Plaintiff, through its agents, Citizens Insurance Agency, Bluefield, West Virginia, and Levisa Insurance Agency, Inc., of Grundy Virginia, issued to defendant a policy of fire insurance, 8076-076-90, for a term from August 8, 1980, to August 8, 1981, covering a two-story block and frame aluminum siding dwelling, situated on Panther Creek, McDowell County, West Virginia, in the amount of $31,500.00 and unscheduled personal property in the amount of $16,760.00, and additional living ex-

penses in the amount of $1,000.00. The policy is subject to Homeowner's Form II and the $100.00 deductible. Copy of said policy is attached hereto and marked Plaintiff's Exhibit "A." This policy was issued upon application of Lonnie Justice and representations of Lonnie Justice to its agents that he was the owner of the aforesaid real estate and had an insurable interest therein.

III

The insured property was destroyed by fire on March 23, 1981, and the home and contents were a total loss. In checking the records in McDowell County, after said fire to determine ownership and mortgages on said property, the plaintiff first learned that said property was not owned by Lonnie Justice as represented in his application but was in fact owned by his son, Scott Justice, an infant age 17 years, and that Lonnie Justice had no interest, at law or in equity, in said property. A copy of the deed in the name of Scott Justice, is attached and made a part hereof, marked Plaintiff's Exhibit "B".

IV

This plaintiff admits that it is liable to Lonnie Justice for the personal property loss and additional living expenses and is willing to adjust said claim upon filing of proper proof of loss by Lonnie Justice, as required under said policy.

V

An actual, justiciable, real and substantial controversy now exists between plaintiff and defendant in respect of conflicting claims and legal relations, concerning which specific relief, through an Order herein of a conclusive character, may be made and all rights and legal relations of the parties hereto may be immediately, definitely and judicially determined, adjudicated and declared, and that said contract of 'Fire Insurance' policy be construed. There is not now pending in any Court any other suit,

action, or other proceeding in which any part of such conflicting claims, rights and legal relations can be determined, adjudicated and declared.

VI

Plaintiff, therefore, demands that this Court do:

1. Determine whether the insured, Lonnie Justice, has any insurable interest in the aforesaid real estate, and if so, to what extent.

2. Whether there is any liability under its policy of insurance for the loss of the dwelling house situate on said property.

3. And that the plaintiff may have such other, further and general relief as it may in law or equity be entitled.

CAMDEN FIRE ASSOCIATION

By Counsel

/s/ J. S. Crockett
J. STROTHER CROCKETT
TUTWILER, CROCKETT, LACARIA & MURENSKY
P.O. Box 739
Welch, WV 24801

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, A Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant.

[Filed Dec. 9, 1981]

ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT

For Answer to the Complaint for Declaratory Judgment the defendant states:

I

That he admits the allegations in Paragraph I.

II

That he admits when he applied for fire insurance he informed the plaintiff's agent, Levisa Insurance Agency, Inc., of Grundy, Virginia, that he was the equitable owner of all of the property insured and also told said agent that the Deed to the real estate was in the name of his infant son, Scott Justice, who was born July 1, 1963, and was approximately 2 years and 5 months old when the defendant purchased the real estate by Deed dated the 5th day of November, 1965, and said agent, Levisa Insurance

Agency, Inc., informed this defendant that the fire insurance policy could be issued in his name and the policy would provide the requested coverage; that the fire insurance policy #8076-076-90 issued for the term August 8, 1980 to August 8, 1981 was a renewal of the fire insurance policy issued August 8, 1979, for a term of one year, to-wit, August 8, 1979 to August 8, 1980. Defendant's dwelling house was insured for $35,500.00 (rather than for $31,500.00 as alleged in Paragraph II) and his personal property was insured for $17,750.00 (rather than $16,760.00 as alleged in Paragraph II) and was insured for $7,100.00 for Loss of Use and $3,550.00 for "other structures", all as shown by Exhibit "A" attached to the Complaint. The defendant denies all other allegations contained therein and demands strict proof thereof.

III

The defendant admits the insured property was destroyed by fire on March 23, 1981, and that said home and contents were a total loss. The defendant denies all other allegations contained in Paragraph III of plaintiff's Complaint, and demands strict proof thereof.

IV

The plaintiff admits that it is liable to the defendant for personal property losses incurred by the defendant for personal property in said home which was destroyed by said fire and that the plaintiff is liable to the defendant for his loss of use of said home and property and for additional living expenses. The defendant denies that he has not filed a Proof of Loss with the plaintiff and demands strict proof thereof. The defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph IV of the plaintiff's Complaint, and demands strict proof thereof.

V

That he neither denies nor admits the allegations in Paragraph V, but is willing for his contract of insurance to be judicially determined, adjudicated and construed, and admits that there is not now pending in any Court any other suit, action or other proceeding in which any part of the claims, rights and legal relations can be determined, adjudicated and declared.

VI

The defendant neither admits nor denies the allegations and relief demanded in Paragraph VI of the plaintiff's Complaint.

COUNTERCLAIM

By way of affirmative relief the defendant, Lonnie Justice, alleges and says as follows:

(1) That the plaintiff, or an agent thereof, sent agents from General Adjustment Bureau to adjust the loss occasioned by the fire which totally destroyed defendant's home, and the contents thereof on March 23, 1981. The defendant told the adjusters the facts he knew concerning said fire, and promptly filled out on forms provided by said adjusters, Proof of Loss for the personal property destroyed in said fire, and returned said Proof of Loss form to said adjuster.

(2) The defendant has not been paid for his personal property loss or for his loss of use of said home, which includes additional living expenses, although the plaintiff admits that it is liable to the defendant for such losses.

(3) The defendant demands that the plaintiff pay the defendant for his personal property losses and for the loss of use of said home, which includes additional living expenses, which the defendant suffered as a result of the

fire which destroyed the defendant's home on March 23, 1981, plus interest from March 23, 1981.

(4) The failure of the plaintiff to pay the defendant for his personal property losses, loss of use of said home, and additional living expenses, are the result of gross, willful, and wanton misconduct on the part of the plaintiff toward the defendant, and as a direct and proximate result thereof the defendant, Lonnie Justice, has suffered great annoyance, mental anguish, and inconvenience, for which the plaintiff is liable, in addition to the aforesaid compensatory damages.

WHEREFORE, the defendant, Lonnie Justice, demands judgment against the plaintiff, Camden Fire Association, a Corporation, as follows:

(1) Compensatory damages in the amount of $63,900.00; and,

(2) Punitive damages in the amount of $25,000.00.

Defendant demands a trial by jury of all issues so triable.

LONNIE JUSTICE
By Counsel

BALLARD AND BRUMFIELD
Attorneys for Defendant
Eight Bank Street
Welch, West Virginia 24801

By: /s/ W. H. Ballard II

CERTIFICATE OF SERVICE

The undersigned, of counsel for defendant, hereby certifies that service of the foregoing ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT was made upon the plaintiff by mailing, postage prepaid, a true and accurate copy of same to counsel of record for the plaintiff, J. Strother Crockett, addressed to him at the First National Bank Building, Welch, West Virginia, 24801, this 9th day of December, 1981.

/s/ W. H. Ballard, II
Of Counsel for Defendant

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, A Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant.

[Filed Mar. 23, 1982]

AMENDED COUNTERCLAIM

The defendant adopts herein the allegations in Paragraphs Nos. (1), (2), (3) & (4) of his original Counterclaim the same as though set out herein in extenso and, in addition thereto, states:

(5) The defendant has not been paid for the loss of his dwelling house which was insured by the plaintiff's fire insurance policy #8076-076-90 for the term August 8, 1980, to August 8, 1981, which policy was the renewal of the fire insurance policy issued by the plaintiff on August 8, 1979, for a term of one (1) year, to-wit, August 8, 1979, to August 8, 1980. Each of said policies insured defendant's dwelling house for $35,500.00, which dwelling house was destroyed by fire on March 23, 1981.

(6) Defendant has not been paid anything by the plaintiff for the loss of his dwelling house or for his personal property losses or for the loss of the use of his said home or for additional living expenes occasioned by the destruction of his home and of his personal property.

WHEREFORE, the defendant, Lonnie Justice, demands judgment against plaintiff, Camden Fire Association, a Corporation, for compensatory damages in the amount of $63,900.00, with legal interest thereon from March 23, 1981, until paid, and for punitive damages in the amount of $25,000.00, and costs.

DEFENDANT demands a trial by jury.

LONNIE JUSTICE
By Counsel

BALLARD AND BRUMFIELD
Attorneys for Defendant
Eight Bank Street
Welch, West Virginia 24801

By: /s/ W. H. Ballard, II
W. H. BALLARD, II

CERTIFICATE OF SERVICE

The undersigned, of counsel for defendant, hereby certifies that service of the foregoing AMENDED COUNTERCLAIM was made upon the plaintiff by mailing, postage prepaid, a true and accurate copy of same to counsel of record for the plaintiff, J. Strother Crockett, addressed to him at the First National Bank Building, Welch, West Virginia, 24801, this 21st day of March, 1982.

/s/ W. H. Ballard, II
Of Counsel for Defendant

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant.

[Filed July 23, 1982]

AMENDED ANSWER AND AMENDED COUNTERCLAIM

The defendant adopts herein the allegations set forth in his original Answer, Counterclaim and Amended Counterclaim as though set out herein *in extenso*, and in addition thereto, by further reply and answer to the plaintiff's Complaint, answers and says as follows:

First Defense

That the plaintiff, Camden Fire Association, a Corporation is estopped to deny that the defendant, Lonnie Justice, is entitled to recover for the loss of the dwelling house situate at Panther, McDowell County, West Virginia, by reason of the expressed representations of the plaintiff's agent and servant, Levisa Insurance Agency, Incorporated, a Corporation, at the time the defendant purchased the said insurance policy, that the defendant did have an insurable interest in said real estate and that the defendant would be covered by said insurance policy.

Second Defense

The Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the defendant demands that the plaintiff's Complaint for Declaratory Judgment be dismissed.

LONNIE JUSTICE
By Counsel

BALLARD AND BRUMFIELD
Attorneys for Defendant
Eight Bank Street
P. O. Box 633
Welch, West Virginia 24801

By: /s/ G. David Brumfield
G. DAVID BRUMFIELD

CERTIFICATE OF SERVICE

The Undersigned, of counsel for Defendant, hereby certifies that service of the foregoing and hereto annexed AMENDED ANSWER AND AMENDED COUNTERCLAIM was made upon the plaintiff by mailing, postage prepaid, a true and accurate copy of same to counsel of record for the plaintiff, J. Strother Crocket, addressed to him at the First National Bank Building at Welch, West Virginia, 24801, this 23rd day of July, 1982.

/s/ D. David Brumfield
Of Counsel for Defendant
C. DAVID BRUMFIELD

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant and
Third-Party Plaintiff,

vs.

LEVISA INSURANCE AGENCY,
INCORPORATED, a Corporation,
Third-Party Defendant.

[Filed Apr. 20, 1985]

MOTION

Pursuant to Rule 37 of the West Virginia Rules of Civil Procedure, the Defendant and Third-Party Plaintiff, by counsel, moves the Court to strike the pleadings of the plaintiff herein for failure to comply with the Order of the Court entered herein on the 4th day of Feb-

ruary, 1983, and for such other, further and general relief, as to the Court, his cause may warrant.

LONNIE JUSTICE
By Counsel

BALLARD AND BRUMFIELD
Attorneys for Defendant and
Third-Party Plaintiff
P. O. Box 633
Eight Bank Street
Welch, West Virginia 24801

By: /s/ G. David Brumfield
G. DAVID BRUMFIELD

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE INSURANCE ASSOCIATION,
a Corporation,
Plaintiff,

vs.

LONNIE JUSTICE,
Defendant.

[Filed June 14, 1985]

MOTION TO SET ASIDE THE JUDGMENT AND AWARD DEFENDANT A NEW TRIAL

Defendant moves the Court to set aside the judgment and verdict entered thereon on June 1, 1983, in the amount of $361,276.16 on the following grounds:

1. The verdict and judgment entered thereon is contrary to the law and evidence in this case and is not supported by the evidence.

2. The verdict entered thereon is excessive and evidences passion and prejudice on the part of the jury.

3. The Court erred in permitting the plaintiff to amend his pleadings to increase the ad damnum clause after the verdict and in the absence of defendant and its counsel, who were not given any opportunity to resist it.

4. The Court erred in striking the pleadings of the defendant.

5. The Court erred in admitting improper evidence over the objection of the defendant.

6. The Court erred in excluding proper evidence offered by the defendant.

7. The Court erred in giving certain instructions over the objection of the defendant.

8. The Court erred in refusing to give proper instructions offered by the defendant.

9. Plaintiff's Counsel was guilty of improper and unethical conduct in asking his witness to read the name of one of defendant's directors for the sole purpose of inflaming and prejudicing the jury and which did so inflame and prejudice the jury and was not cured by the Court's instructions to the jury to disregard same.

10. And for such other grounds as may be offered upon the hearing of this motion.

THE CAMDEN FIRE INSURANCE ASSOCIATION
By Counsel

/s/ J. Strother Crockett
J. STROTHER CROCKETT
Counsel for Plaintiff
P. O. Box 983
Welch, WV 24801

CERTIFICATE OF SERVICE

I, J. Strother Crockett, do hereby certify that the original of the foregoing Motion was mailed to Paul Lambert, Clerk of the Circuit Court on the 10th day of June, 1983, and a true copy of same was mailed to G. David Brumfield, Ballard & Brumfield, Attorneys at Law, Bank Street, Welch, West Virginia, on this the 10th day of June, 1983.

/s/ J. Strother Crockett
J. STROTHER CROCKETT

NOTICE

To: G. DAVID BRUMFIELD
Counsel for Defendant

Notice is hereby given that the plaintiff will bring the attached motion on for hearing before the Circuit Court of McDowell County, West Virginia, at a date to be mutually agreed upon and upon the convenience of Counsel.

/s/ J. Strother Crockett
J. STROTHER CROCKETT

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE INSURANCE ASSOCIATION, INC.,
Plaintiff,

LONNIE JUSTICE,

v.

Defendant,

[Filed Nov. 30, 1983]

MOTION TO SET ASIDE PREVSIOULY ENTERED ORDERS AND JURY VERDICT

Now comes the plaintiff, Camden Fire Insurance Association, Inc., moves this Court to set aside the order entered May 2, 1983 striking the answer to the counterclaim of Lonnie Justice and entering a "default" judgment order in favor of Lonnie Justice against Camden Fire Insurance Association, Inc., on said counterclaim for both compensatory and punitive damages, and Camden Fire Insurance Association, Inc., further moves this Court to set aside the jury verdict returned in this action on June 1, 1983 and the "Judgment Order" entered on said verdict on June 1, 1983, and Camden Fire Insurance Association, Inc., further moves this Court to set aside its order entered June 29, 1983 overruling the post-judgment motions of Camden Fire Insurance Association, Inc., in this case.

The aforementioned motions are made pursuant to the provisions of Rule 60(b) of the West Virginia Rules of Civil Procedure.

Dated this the 21st day of November, 1983.

/s/ James R. Watson
JAMES R. WATSON
Counsel for Camden Fire
Insurance Association, Inc.
P. O. Box 1588
Charleston, WV

STEPTOE & JOHNSON
Charleston, WV

Of Counsel

NOTICE

Please take notice that the foregoing motions will be brought on for hearing before the Honorable Judge Marinari at 10:00 A.M. on Monday, December 12, 1983, at which time you may appear and defend as you deem appropriate.

Dated the 21st day of November, 1983.

/s/ James P. Watson
JAMES R. WATSON
Counsel for Camden Fire
Insurance Association, Inc.
P. O. Box 1588
Charleston, WV

STEPTOE & JOHNSON
Charleston, WV

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 1983, I served the foregoing "Motion to Set Aside Previously Entered Orders and Jury Verdict" and "Notice" upon David Brumfield, attorney of record for the plaintiff, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed to him at Ballard and Brumfield, Eight Bank Street, Welch, West Virginia.

/s/ James R. Watson
JAMES R. WATSON

APPENDIX E

IN THE CIRCUIT COURT OF McDOWELL COUNTY
WEST VIRGINIA

Civil Action No. 81-C-736

CAMDEN FIRE ASSOCIATION, a corporation,
Plaintiff

v.

LONNIE JUSTICE,
Defendant

[Filed Jan. 3, 1984]

PROCEEDINGS had in hearing on motion of plaintiff before the Honorable Jack Marinari, Judge, on Tuesday, December 20, 1983, beginning at 3:52 o'clock p.m.

PRESENT:

James R. Watson, Charleston, West Virginia, Counsel for Plaintiff

G. David Brumfield, Welch, West Virginia, Counsel for Defendant

Lawrence E. Morhous, Bluefield, West Virginia, Counsel for Third-Party Defendant (Previously dismissed from suit)

[2] THE COURT: All right, gentlemen.

MR. WATSON: Judge Marinari, am I correct that the Court did receive a copy of our memorandum in support of our motions?

THE COURT: Oh, yes. I have it here.

MR. WATSON: Your Honor, I believe the situation is fairly clear. The appropriate motions to set aside the jury verdict were filed and as the Court is well aware, it overruled those motions and the motions that we are here today are pursuant to Rule 60(b) asking the Court to set aside specifically the initial default judgment order that I referred to back in May, 1983, and the jury order, judgment order and the subsequent order overruling or denying the motion for postjudgment relief filed by Mr. Crockett in this case.

I hope that the memorandum that we have submitted indicates to the Court our position and I would like to think that there are basically three aspects of this hearing today involving this motion.

The first is pretty straight forward. That is that we seek the relief we request for the reasons primarily set forth in the memorandum, which I will not go into unless the Court wants some specific clarification. I'll be glad to try to comment on that.

THE COURT: You may proceed.

[3] MR. WATSON: The second aspect is that since we are involved with 60(b) and since the amount is substantial, I am requesting that the Court set a date for a hearing, an evidentiary hearing. I have an affidavit with me that I was able to bring signed by a representative of Camden Fire and I would represent to the Court that in essence Camden Fire Insurance Association, the party litigant, had no knowledge of default ever being entered until the time this case went to trial June 4. It's attorney, Mr. Crockett—

THE COURT: Now, Mr. Watson, I don't ever recall default judgment entered in this case. Was there one entered in this case?

MR. WATSON: I'd like to come to that, Your Honor.

THE COURT: Well.

MR. WATSON: The interrogatories propounded by the insured's, Mr. Justice's, counsel, resulted in a failure

to answer and as a consequence, Mr. Brumfield filed a motion to strike the pleadings. As I understand the Court's ruling, the pleadings were struck of Camden Fire and on the counterclaim of Mr. Justice against Camden Fire, the order, in essence if not in fact, relates that a judgment will be entered for failure to answer.

As I read the rules, that is commonly referred to as [4] default judgment order, or some type of sanction if you will. So that's the reason I use that term, default judgment. It was not the classical non-appearance default judgment, but as I understand it, you can enter a default against an individual who fails to answer interrogatories pursuant to court order. There is a technicality there and one that we believe is substantial and that is Mr. Brumfield's motion, was a motion to strike the pleadings and as such the motion did not request a default judgment, although the Court entered the same. And inasmuch as default judgments are not favored in the law, we think there is some question whether or not the relief granted, the default, is appropriate in light of the motion.

So what I'm asking the Court, Your Honor, and I would like to tender to the Court an affidavit of Chris Patton, who is the head of the division of General Accident Group, and Alfred Paul, and the purpose of this affidavit is merely an indication to the Court that if the Court would grant a hearing, we believe that if we would call all the people involved at Camden Fire Insurance Association, etc., the thrust of their testimony would be that they had no knowledge, they had no notice of the interrogatories. They were never tendered by Mr. Crockett to any representative of Camden Fire. The brief that we have filed in support of these postjudgment motions, I [5] believe, stresses at great length the various court rulings in this state and out that in this type of situation where a party litigant is injured by a court ruling due to what appears to be negligence, or even worse, by its representative counsel that the courts are loathe to impose that and this is somewhat of an exception to the general theory that an

attorney is merely an agent of a party litigant, but in a default type of situation, the courts have repeatedly indicated that they do not believe that that's an appropriate decision to punish a party litigant and we are asking the Court to give us an opportunity to have a full evidentiary hearing. We believe that, as opposed to a method of affidavit in light of some of the complex facts—there are people involved in Wheeling, I think somebody down in Bluefield, somebody over in Philadelphia where Camden is—and we can get these people in here so the Court can be very clear as to the entire lack of knowledge of Camden of the situation, despite repeated requests.

In that regard—

THE COURT: Repeated requests to whom?

MR. WATSON: To Mr. Crockett. I think we can demonstrate by evidentiary hearing the failure of him—

THE COURT: You mean you made repeated requests to Mr. Crockett of the status of the situation down here?

[6] MR. WATSON: I did not, but I would represent to the Court that the individuals from Camden Fire Insurance Association did and the file will so reflect and their correspondence will so reflect, Your Honor, and that's the reason we're asking for that type of hearing. That's the—

THE COURT: Why didn't it? If they were trying to hear from Mr. Crockett and never heard anything from him, why didn't they check it out and find out why?

MR. WATSON: I agree with Your Honor that that is a legitimate position. The only thing I would say to that is that if an individual is licensed and authorized to practice law, the courts have recognized that a party litigant does not have to, does not bear the burden of looking behind those qualifications and accomplishments that authorize him to practice in court.

THE COURT: Are you sincere about that?

MR. WATSON: Yes, sir.

THE COURT: That you can hire any Tom, Dick and Harry out here and not pay any attention to them and let something—When was this thing filed?

MR. WATSON: As I recall, the complaint was filed some time in September of '81 and there was a stipulation to answer until December of '81.

[7] THE COURT: Well, all right. That's '81. Do you mean that—

MR. WATSON: So substantial time passed. There's no question about that.

THE COURT: And they didn't follow up, the company didn't follow up? Go ahead. I'm listening.

MR. WATSON: For a period of approximately 18 months as I recall, Your Honor. I think probably 18 months is about right, as I recall. So we believe that an evidentiary hearing is appropriate and the rules, we believe, authorize that. The thing that I have done, and I felt compelled to, and this is still part of the second point with respect to a hearing. We are here on December 20th of 1983, and the initial order striking the pleadings and entering the judgment on counterclaim occurred, I believe, on May 2nd, 1983.

MR. BRUMFIELD: What did you say on the date?

MR. WATSON: I think it was filed in September, '81. Was it '82?

MR. BRUMFIELD: You said '83.

MR. WATSON: I'm sorry. The thing that I'm getting to is that as I view it, counting my fingers and toes, eight months runs if we try to make a direct appeal to the Court's order of May 2, 1983, and I have filed with the West Virginia Supreme [8] Court yesterday or day before. We're here on Tuesday, so it must have been on Friday of last week, a request that they extend the time for appeal for an additional two months until March of 1984. The purpose would be to allow this Court the opportunity to grant such a hearing without imperiling the rights of Camden Fire to seek a direct appeal on that matter because 60(b) motions do not toll the running of time for an appeal. So I have filed that motion because as I understond it, Your Honor is going to be taking a

vacation and may not be able to hear that matter until after January 2, 1984, which means it might bar our time for appeal. I have not heard from the Court, but hope to do so some time this week.

But if we do, not only No. 1, ask the Court to very seriously consider the motions and to grant the relief requested, but if the Court is inclined to take this matter under advisement to grant a full hearing, we will be glad to produce the parties.

This leads to No. 3, which quite frankly, Your Honor, is the first time I've ever done this and it's a very difficult thing for me to do. I'm sure that individuals in this court room are far more aware of the situation with respect to this case than I, having only been notified by the company to undertake an appeal after the verdict came in.

[9] We believe that the Court, and only the Court, at this time, can understand and appreciate our difficulty with respect to inquiring in light of what we believe the substantial authority shows, is a meritorious defense and position by Camden, as well as a position of apparent neglect by its representative at the Bar, that this Court, and Your Honor, might need to consider recusing yourself because you observed that counsel at the trial of this case, as well as at the time of default. At this time, Camden is not fully aware what the excuses, rationale, reasons for Mr. Crockett's failure, as I have outlined to the Court—

THE COURT: Well, why should I recuse myself?

MR. WATSON: I think— What I'm suggesting is that if the Court has any indication, feeling or knowledge of any reason that Mr. Crockett had for failing to answer as indicated by his actions or conduct before the Bar, over which his client, Camden Fire, would not have knowledge of by reason of his not being present, that could put the Court in a very difficult position.

As I have indicated to the Court, I have never been in a situation before, but in light of what appears to be a

blatant neglect to notify a client, one can only wonder what situation would possess Mr. Crockett to so act, and yet there [10] were hearings at times that he apparently had to appear before this Court and we do not know his conduct before this Court.

THE COURT: I still can't see why I should recuse on account of Mr. Crockett's conduct.

MR. WATSON: Well, I think that's the question. The question of Mr. Crockett's conduct is unknown to Camden and—

THE COURT: Well, I don't see why I should recuse myself.

MR. WATSON: I only suggested that if the Court feels that it knows something that does not reflect itself in the record.

THE COURT: I don't know one thing that isn't reflected in that record.

MR. WATSON: Very fine. That's the situation.

THE COURT: All I know is these gentlemen file these actions, they come in, I hear them. I don't know what Mr. Crockett did or didn't do, except what's in the record here. In the orders and the record. I don't know what Mr. Crockett did, I don't know what he failed to do, I don't know what he didn't do.

MR. WATSON: I understand, Your Honor.

THE COURT: Well, I'm not recusing.

MR. WATSON: The other thing that I would merely indicate to the Court, and I believe it should be a substantial concern, [11] as I read the law and the rules of civil procedure, the entry of default judgment, as I have termed it on the failure to answer interrogatories, means that Mr. Brumfield's postjudgment motion to amend his pleadings to conform to the jury verdict is clear error.

The law, I suggest, as indicated in the memorandum, is very clear. A party has an unequivocal right to amend at any time to conform to the evidence, with the one big exception. And that's when judgment by default has been taken. It could very well be, although it's not the

case, that Camden could have said, you know, we did something we shouldn't have done, we're in trouble, let's sit back, we'll take the hit for $25,000.00 on the punitive and then low and behold, there's a motion to amend. The cases indicate, and the rule we believe is very clear. The right to amend does not encompass those situations where the initial underying judgment is taken by default, and we urge the Court to review the authority and the rules in that regard, in that regard particularly. Quite frankly, and quite candidly, it would put Camden in a very difficult position if the Court were to so rule, saying, okay, I'll reduce it to $25,000.00, but I'm not going any further. Camden would then be faced with a situation to take that one bird in hand and leave it, or do we go on? [12] And I suggest to the Court that that may provide the appropriate relief that both parties could live with, but as it is now, we believe that the pleadings, the actions of the parties litigant, the lack of knowledge, etc. require the relief that we request and if the Court is not so inclined, we urge the Court to grant us a full evidentiary hearing and I would ask that we try to set a date so that we can bring the various people in who will testify and produce the documents in their claim files to show that there was no communication as I have outlined to the Court.

In that regard, I would add two very quick things. My understanding from checking with the Clerk's office, Your Honor, is that the Court has the file in this case. I have tendered to Mr. Brumfield today the affidavit of Mr. Patton which we would ask to be submitted to the Court in consideration and support of these rule 60(b) motions. In addition, I have brought with me today the answers of Camden Fire Insurance Association to show to the Court, to represent to the Court, that had Camden been adequately and promptly notified of the interrogatories, it could have and would have responded, but it was not, and that should not be held against it, to the preju-

dice, to the extent that has been held in this Court. [13] So I do ask leave at this time whereby appropriate order, to tender and file to the Court the affidavit of Chris Patton in support of the 60(b) motions, as well as the intended answers of Camden Fire Insurance Association with respect to the interrogatories which initially led to this default. I thank Your Honor very much.

THE COURT: Mr. Brumfield?

MR. BRUMFIELD: First of all, let me touch on the very end thing mentioned by Mr. Watson, Your Honor. I object to Camden's filing of answers to interrogatories at this time. I think it's inappropriate. That has nothing to do with their 60(b) motions and I think it's merely Camden's attempt to—Really, all that, completely unsupported facts that are alleged in their brief, completely throughout their brief, without any merit to them, I think this attempt now to file interrogatories is, at this time, just a further strategy. The case is over. There's a final judgment and there has been for what, almost eight months now, and the interrogatories, I really forget when we did request them—over a year ago. But I don't object per se to the filing of the affidavit. I obviously object to the motion, but I don't object to him filing an affidavit in support of it, but I do take exception and object to the Court permitting him, by order, to at this time file [14] interrogatories. That is merely an attempt to get a bunch of factual issues before the Supreme Court or before this Court, which really are moot.

Now, to go on to other aspects of the motion, the position of Camden is that they are completely without notice of this, as they claim a complete injustice put upon them, but in their brief, which by the way as I read the brief and I read the affidavit that he's tendered today, they don't even conform factually. In the brief, which I was supplied last Friday with a copy. I just received, just as the motion began, I received a copy of the affidavit and read it while counsel for Camden was making his presentation before. But in the brief, and in what is alleged to

be facts, Camden claims that they had no knowledge of the alleged inaction of their counsel and of the action of the Court, they state, until on May 25th.

Well, that's not mentioned, really, in their affidavit. It's glossed over. They also mention in their affidavit— At that time they say Mr. Crockett called them, and informed them— This is the same representative who later filed an affidavit— of the interrogatories he was, that Camden was supposed to have answered, the order compelling discovery and of judgment. Now, that was on the 25th and the facts set forth in their brief, which is contrary to the affidavit, so what is [15] the truth in this case? Like the Court's already said, we don't really know, but I don't think Camden knows either, to this day, and now the new set of attorneys have come in here and have berated the previous attorney and still haven't gotten their act together. But the fact of it is in this brief, and in the affidavit that's filed, Camden had knowledge. Of course, we know that because they had an attorney present.

Now, they continually refer to this as a default judgment, default judgment, and in their brief cite a plethora of cases on default judgment. Well, the Court knows, really, what a default judgment is and we're not going to belabor that, but this ruling is not a default judgment. The Court has a right, as the Court's aware and the Court entered properly, a right to sanction parties in a case for failure to honor the Court's orders. A Court has to have an ability, as the Judge knows, to order parties to comply with the Court's order and in this case the Court was more than fair. We had two different hearings on this very matter and quite a period of time went from the time of the hearings until the orders were entered and then later from the time the order was entered until the hearing on damages. Now, Camden had a chance to present a motion to amend the order before we had a hearing on the damages. Camden elected not to do so, even though in their [16] affidavit that's filed today and

in their brief, they set forth the fact that they knew of it. And Mr. Watson even implied that today, said what, maybe Camden just took the position, well, maybe we did something wrong but so what? So what? That's the same attitude that I think the jury heard. We'll just sit back and wait and see what happens. And now they tell the Court, hey, we wouldn't really mind if the Court decided that we would just have to pay $25,000.00, but what they really want is the Court to retry this case under 60(b) and not have us— We've already put our evidence on eight months ago. Now, I don't know if Mr. Crockett was negligent, but if you read their brief, they're claiming that, and if that's the case, then I think that Mr. Crockett ought to have a right to defend himself or they can file a civil action, if they wish, against Mr. Crockett.

And I also take exception to the way that this brief was filed. If there's a brief, if Steptoe & Johnson wishes to file a brief before this Court, they ought to file it in the Clerk's office, rather than just mail it to the attorney, I mean to the Judge, and state for obvious reasons they don't want to file it with the Court.

And I think there's other matters that the Court ought to consider. There was a third party—

[17] THE COURT: I don't like the idea of asking this Court to seal the records in this case. Why should they be sealed?

MR. BRUMFIELD: In this case, Your Honor, if the Court recalls, there was a third-party complaint. Camden initially instituted this suit against Mr. Justice and then he filed a third-party complaint. Now, when the Court ruled and struck the pleadings of Camden after two different hearings to compel discovery, the Court also ruled, and I think it's correct, the Court's ruling was correct at the time, on all this—used the right to strike, the right to enter judgment. The Court also ruled that Mr. Justice's claim against Levisa, the agent, for negligence was really moot. So, they don't even touch on that when they come in here on 60(b) which is a motion,

really, is a claim for equitable relief. That's what 60(b) is. What's the Court to do with the judgment, then, of Levisa? Obviously, if it was moot originally and we reinstate it, the Court would have to reinstate the claim against Levisa, which was already litigated in this case, over eight months ago. Already.

Now, it puts—It's sort of like proving a negative, Your Honor. We can't prove a negative. We can't prove that Camden didn't know about these things, but then no party in a law suit could ever prove a negative. Nobody can prove a [18] negative. They can say they didn't have notice, but they had an attorney present. It wasn't a default judgment. They were represented and even by their affidavit and their brief, they elected not to take action. They had no representative present at the trial, other than Mr. Crockett, on the hearing on damages. There was also, according to the brief, an affidavit, further discussion, between Camden and their attorney before the hearing to set aside the verdict that Mr. Crockett presented to this Court in June. Camden did not elect, at that time, to file another 60(b) motion, nor did they elect to file a—Nor did they elect to fire Mr. Crockett at that time., even though there's no question they knew what had happened. They didn't elect to file affidavits at that time in a 60(b) motion. Immediately after the motion to set aside, I'm advised that Mr. Crockett, on behalf of Camden, immediately requested the record in this case be prepared and the court reporter typed up the entire record.

So, they've had ample notice but yet as of whatever date the motion to set aside was filed, in late November, about six or seven months after the judgment, they come up with a 60(b) motion, claiming, now, that there will be no injustice, no detriment to anyone, if we start all over again. Well, what about Mr. Justice, the original insured? Isn't it unfair to him? [19] Wouldn't it be also unfair to Levisa? Mr. Justice, the Court—He's not in good health, but the Court, he's here today. But

what about a year from now? Will he still be alive? Or what about a month from now? But the real question here, No. 1, I think—Let's get down to brass tacks. This was not a default judgment. I don't think the case is on point on that.

No. 2, if there's an action between Camden and Strother Crockett, attorney at this Bar, then that's something for them to assert against Mr. Crockett if they so desire. I don't think that that has anything to do—We can't defend Mr. Crocket. Mr. Crockett can't defend himself in this action and as far as talking about injustice, if, in fact another jury determines, if they wish to proceed against Mr. Crockett, that he is liable, then there's no injustice to Camden because they completely seek indemnity from a person who they claim is negligent. I don't know if Mr. Crockett is negligent in any manner.

Now, I think—I also know that I've talked to Mr. LaCaria. In their brief, they make the point that this case was orginally given to Mr. Tutwiler and that they didn't realize that he'd even been involved, that Tutweiler was dead and that Mr. Crocket wasn't in the firm. Now, those matters are set forth in their brief, but they're absurd for a company that still [20] claims that, yet they were in constant communication with Mr. Crockett. Now, I've talked to Mr. LaCaria about that and he says that they never received any letters from Camden after Strother left the firm, until they got a letter that they were maybe going to get sued over this, too. I think it's just a matter of shotgun after the trial on Camden Insurance Company.

Now, their request for an evidentiary hearing; we object to, Your Honor. They filed an affidavit and—The affidavit per se I don't object to. Like I say, I do object to their filing interrogatories now and the Court even permitting that to be done. I mean it's improper now in light of the final judgment and it's not part of the 60(b) motion which we're hearing. There's no

purpose to be served and it would be unfair to Levisa and to Mr. Justice to present and permit an evidentiary hearing. It would be a complete, one-sided affair after the fact, that we would have no way that we could respond to or prove the negatives. They've already prepared a rather extensive brief that Your Honor's seen and read and the proper procedure for Camden and for any party in this position is to seek an appeal to the Supreme Court, which I'm sure they intend to do, and at that time the Supreme Court can decide. But as far as I can see, there's no error in this record. The Court had a right to enter sanctions, which it did. Now, the matter [21] that Mr. Watson claims concerning the amendment after the evidence was in, well, I'm sure he'll intend to present that to the Supreme Court. That's a—That was a perfectly proper thing to do. First of all, as I say again, it was not a default judgment. They were here and present. It wasn't a case where you have a default that nobody's present at a hearing on damages. They were present and represented by an attorney who cross-examined witnesses, made opening and closing statements, was present the whole time. Now, it would be absurd, I think, that a jury—And in that case, too, as the Court remembers, there was never any announcement of the amount sued for, except by counsel for defendant. The jury then decided what was fair and is our Supreme Court—I don't think they will—going to say that a jury, at a hearing on damages, can't in fact determine what's fair and reasonable under the circumstances. Now, I think it would be true, if it were a true default case, and a person got a summons and said, oh, we're only being sued for a hundred dollars. There's no reason to hire an attorney. But in that case they hired an atttorney, came in and they defended. It was not a true default case. It was a judgment on the pleadings rendered by reason of sanctions of the Court and then setting down of damages on that matter. And Camden

had an absolute right to present any evidence at that [22] hearing on damages that it wished. The only limitation that Camden was under at the hearing on damages, and the Court limited to that, we couldn't present evidence concerning the liability issue. But Camden then, of it's volition, admitted in the affidavit and admitted—Well, not in the affidavit. They changed the affidavit, but admitted in their brief, elected not to present evidence on damages. So how can they claim now that it was improper for a jury to assess the amount of damages that they did? And, therefore, we feel it's proper for the Court to deny the motion and also to deny the right to file these interrogatories at this time, because what it would do, in effect, would be to prejudice the plaintiff by muddying the record. Or prejudice Mr. Justice, who' the original defendant. I'm sorry.

THE COURT: All right, Mr. Watson. Do you want to answer?

MR. WATSON: Thank you, Your Honor. I'll try to be brief.

I think the first question is whether or not this is a default has to do more than with words or technicality. The order specifically says, is accordingly adjudged and ordered that the pleadings of the plaintiff, Camden Fire Association, a corporation, are hereby stricken and judgment is hereby granted. (23) Now, I interpret the striking of the pleadings and the entering of judgment a default. From what I understand of the cases that—

THE COURT: That was judgment on the pleadings, wasn't it?

MR. WATSON: Well, if you strike the pleadings, I don't know how there can be pleadings if you're in default, because you're entering on a counterclaim. See, you have a counterclaim that struck the pleadings, which would be the reply, which is struck, it's in default. So I think the point is that the Court's action in that regard is tantament or equivalent to default and the point is

that when that occurs, we believe that the post verdict motion is appropriate for the reasons indicated.

I'm sure David has been down before the Supreme Court and one of the favorite questions they have is that before you came here, did you ask the trial court to do what you're asking us to do, so we didn't have to rule? And that's the reason I'm here. It's not only to protect the rights of Camden, but it's to be able to advise the West Virginia Supreme Court yea or nea, that before we came here, we went back to the court under Rule 60(b). That's what that rule is there for, asking the court for relief. And that's the reason we're here. We're not here under any pretext, any guise, except to say, Your Honor, this is an obviously important matter and we're here asking the [24] Court to review it. So when it gets down to, or up to the West Virginia Supreme Court and they ask that question, I can say I went. And then when they ask the second question of why don't you just bring an action against Mr. Crockett, I can say that it seems to me that we should proceed in the logical order of asking this Court, as well as the West Virginia Supreme Court, to see if that judgment stands. And that's the reason we're here.

The time limit thing somewhat bothers me. It should be in the file, the official record, and I think Mrs. Hicks states that she gives the transcript on the 4th day of November, 1983. I think in light of the fact that this trial occurred in May and I think June 1, 1983, but the transcript was not completed until the 4th of November and I think the Court's aware, Mr. Brumfield's aware, we have tried to schedule this hearing after we figured out what the transcript was and what we thought the law was. So I don't think that Camden has been dilatory in their fashion. With respect to the affidavit—

THE COURT: When did you request the transcript?

MR. WATSON. Beg your pardon?

THE COURT: When did you request the transcript?

MR. WATSON: I'm not sure, Your Honor, when I requested it, but it was my understanding that Mr. Crockett requested it [25] immediately after. If I am mistaken in that, then I apologize to the Court, but that was my understanding.

COURT REPORTER: I think he requested it on June 28th, but that was the same day I received requests to type four records.

MR. WATSON: Well, the trial happened on June 1, Your Honor.

THE COURT: It was in June.

MR. WATSON: Well, I think he didn't request it until he had the verdict, when you had the order on the postjudgment—

THE COURT: Well, he filed a brief here, or a motion on the 25th of June. That's what I have here, saying he wanted to have the verdict set aside. I suppose I heard it some time after that.

MR. WATSON. I have a copy of the order, Your Honor. It is my understanding that an order denying postjudgment relief was entered on the 29th of June, so I think the transcript, in light of the Court's ruling, was requested timely and we've tried to move with reasonable diligence.

The only thing that I would add would be twofold. One, to make sure there is no question, I am not suggesting in the least bit that Camden said, we'll take a default. I'm merely saying that if the cases are reviewed and I think the classic example is [26] the drunk driver case where he injures a plaintiff and the defense attorney says, well, they're only suing for compensatory damages under the recent West Virginia law on reckless, and we might get punitive. Let's take a default and give him the medical bills. We won't run the risk of getting punitives, then. And it is a strategy which has been employed from time to time, although very rarely. It was not employed in this case. I merely used it for illustrative purposes to indicate to the Court that the

rule is thou shall not enter judgments in excess of that pleaded in default type cases. And I believe this is such case.

Your Honor, I do have that affidavit. I do not believe it is in any manner significantly at odds with those recitations set forth in the brief. I would merely indicate to the Court that the last communication was apparently on February the 24th, then on May the 24th, 1983, Mr. Crockett telephones Alfred Paul, who is the general agent for Camden, to say there's some type of problem. The next communication was the ensuing day, May the 25th—

THE COURT: Was that in February?

MR. WATSON: No. This is in May.

THE COURT: Oh, May

MR. WATSON: What I'm saying is the order was entered [27] clear back in, I think in February, finally compelling and then the default entered in April, but Mr. Crockett doesn't write a letter until May the 25th, which is received on—

THE COURT: Letter to who?

MR. WATSON: To Alfred Paul, the general agent for Camden, in Wheeling. May the 31st, the day of the trial. I mean that's what the affidavit says. It's saying we didn't hear anything, you know, until the day of the trial and that we're trying the case in which liability has already been entered. And I think that puts a party litigant in an extremely difficult position. Moreover, I think there is a substantial question here that if you enter a default, or a judgment if you will, in April, which I call a default judgment, on compensatory and punitives, what in the heck are you litigating at the inquiry? Now, there is some question whether or not courts can enter default judgment on punitive damages and that's raised in the brief also.

THE COURT: Who decides that question? Has that been decided?

MR. WATSON: No, Your Honor. It's discussed in the brief that there is some question whether or not—

THE COURT: Who's decided that question? Go ahead.

MR. WATSON: It's my understanding the Court did. As I [28] read the ruling, as I read the order, and what we're saying is that if there is an entry of an order saying compensatory and punitive damages, there must be a factual basis for the punitives judgment, not the dollar judgment on the punitives, but must be a factual basis on the punitive judgment and there was none. Normally, that was done by affidavit, as I am sure this Court is aware, when the plaintiff comes in and says somebody didn't answer, you say fine, bring me an affidavit saying he was served, that your property damage to your automobile was $300,00, something like that. That wasn't done here, so there was no factual predicate in the record, absent the nonanswering on which to base a punitive judgment.

THE COURT: Well, your lawyer was here.

MR. WATSON: Yes, that's true.

THE COURT: Your lawyer was here.

MR. WATSON: That's true. No question about it. But what I'm saying is that I don't believe the law says by reason of mere nonaction that raises itself to a basis of a punitive award and I know of no authority to that, so, Your Honor, we do request you grant the relief heretofore, permit us to file by leave of Court the affidavit I've referred to and the interrogatories. We fully urge the Court to give us a hearing date so that we can have a full factual inquiry into these [29] very things that Mr. Brumfield keeps saying, well, how do you prove a negative. They don't have to prove negatives. We have the burden. Please give us the opportunity to, of proving that Camden Fire did not have knowledge of this. And, Your Honor, that's our request today.

Thank you very much.

THE COURT: Did you want to say something?

MR. MORHOUS: Your Honor, let me just note my appearance on the record. As you know, from the hearing, I represented Levisa Insurance Agency, Inc., the third-

party defendant in this case. I have not at any point in time been given formal notice of this hearing, nor did I receive a copy of the brief or the motion or the affidavit. Mr. Brumfield was kind enough to call me and alert me to the fact that he sent me a copy of the brief. I think I spoke to Mr. Watson's associate, Mr. Bastian, about a month ago, about him planning to do this thing.

Obviously, we have a vested interest. We believe your order was proper at the time in dismissing Levisa. I think this hearing certainly has some repercussions, possible repercussions, on Levisa, although we don't believe this Court ought to upset it's earlier order dismissing Levisa, but I just want the Court to know that I am appearing for Levisa, it has a stakehold interest in this particular hearing and we wanted [30] you to know that we are interested in the hearing for whatever purpose that may serve to the Court.

THE COURT: Is that all?

MR. BRUMFIELD: One quick matter, Your Honor. I know that the brief was not filed and I would ask that that be filed just for the purpose, with the clerk, since there appears to be a contradiction in the facts set forth in the brief and in the affidavit, as I've already alluded to, because it says on page 3, and I quote: "On May 25, 1983, Attorney Crockett called Camden representative in Wheeling, West Virginia, and informed him of the interrogatories, the order compelling discovery and the default judgment." Now that's their quote. Now, that's different than set forth in the affidavit, as I read their affidavit. I again object to the filing of the interrogatories and also to an evidentiary hearing as the same is improper and inequitable in light of all the circumstances and the Court's opportunity to read the law and have considered the facts and circumstances of the entire case.

THE COURT: I do think that a copy of that memorandum should be filed in the clerk's office. If you don't have one, Mr. Watson, I can give you mine. You can file mine.

MR. WATSON: However the Court would like to proceed.

[31] THE COURT: You can file mine if you want to file it. But at the present time, Mr. Watson, I'm denying all your motions and so forth. Okay. Prepare the order.

Thereupon the hearing was concluded. A short discussion followed off the record concerning preparation of the order.

MR. WATSON: Your Honor, May it please the Court, one thing I would ask, and I'm not sure what the local practice is here with respect to a stay. As I understand the rules, a stay must be specifically entered by the order. Otherwise, there is no stay, although it is quite often in practice to the contrary. So I would ask that there be a stay.

THE COURT: All right. Get the order.

MR. BRUMFIELD: Well, I object to the stay. We'll prepare the order and get it up here tomorrow or he can bring it up tomorrow, but I object to the stay, in light of the time.

THE COURT: He's already in the Supreme Court. I'll deny the stay.

STATE OF WEST VIRGINIA
COUNTY OF MCDOWELL, to-wit:

I, Elizabeth Jane Hicks, Official Reporter for the Circuit Court of McDowell County, West Virginia, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the hearing on a motion by the plaintiff in the action of Camden Fire Association, a corporation, Plaintiff, vs. Lonnie Justice, Defendant, Civil Action No. 81-C-736, on December 20, 1983, as reported by me in shorthand and mechanically.

Given under my hand this 3d day of January, 1984.

/s/ [Illegible]
Official Reporter
Circuit Court of
McDowell County,
West Virginia

APPENDIX F

No. ———

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CAMDEN FIRE ASSOCIATION,
Petitioner and
Plaintiff Below,

v.

LONNIE JUSTICE,
Respondent and
Defendant Below.

From the Circuit Court of
McDowell County, West Virginia

PETITION OF PLAINTIFF,
CAMDEN FIRE INSURANCE ASSOCIATION,
FOR APPEAL

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* * * *

IV. IT WAS ERROR FOR THE TRIAL COURT NOT TO CONSIDER THE INTERESTS OF CAMDEN SIGNIFICANT AND TO SUMMARILY REJECT ITS INTERESTS.

Intertwined with the interests previously asserted by Camden, this court has held that the amount of damages awarded in a default judgment is a proper consideration in determining whether the default should stand. In the case of *Parsons v. Consolidated Gas Supply Company*, 256 S.E.2d 758, 763 (W. Va. 1979), this Court stated that "[g]enerally, other courts have given weight to the amount of monetary damages claimed in deciding whether default judgment should be sustained.") *Id.*, citing *Hutton v. Fisher*, 359 F.2d 913 (3rd Cir. 1966); *Rooks v. American Brass Co.*, 263 F.2d 166 (6th Cir. 1959); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242 (3d Cir. 1951). In *Parsons*, this Court considered $35,000 to be a significant amount; therefore, Camden's interest in a $361,000 judgment is significant indeed.

V. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO ALLOW RESPONDENT TO AMEND HIS *AD DAMNUM* CLAUSE AFTER THE HEARING WHEN THE JUDGMENT WAS OBTAINED BY DEFAULT.

The trial court's decision to allow the defendant to amend his *ad damnum* clause clearly violates both Rule 54(c) of the West Virginia Rules of Civil Procedure and the due process clause of the Fourteenth Amendment. Rule 54(c) mandates that:

> A judgment by default shall not be different in kind from or exceed in amount that plead for in the demand for judgment.

Admittedly, Rule 54(c) expresses the general rule which allows litigants to amend their pleadings to conform to

the evidence presented; but that Rule expressly excludes *judgments obtained by default.* The net effect of Rule 54(c) is to allow parties to make informed decisions about whether to allow a default judgment to be taken against them. Even assuming, arguendo, that Camden was aware of the existence of the interrogatories, the subsequent order compelling discovery and, finally, the default judgment order, it would still be improper under Rule 54(c) for this Court to allow a party to amend his *ad damnum* clause after a default judgment had been rendered. *Michie's Jurisprudence* discusses this basic proposition by explaining that "[t]he general rule has been that greater damages cannot be awarded than are claimed in the plaintiff's initial pleading." *Damages* § 76, at 513. That treatise continues by explaining that the West Virginia Rules of Civil Procedure now allow amendments to conform to the evidence, "except as to a party against whom a judgment is entered by default." *Id.* at 154.

This Court, in its recent decision of *Cordell v. Jarrett,* 301 S.E.2d 227 (W. Va. 1983), was confronted with a plaintiff who was granted a default judgment in Magistrate Court for the amount plead—$100, plus costs. Subsequently, the defendant appealed, but failed to advise the circuit court of an address change. A hearing *de novo* was held in circuit court, and judgment was awarded to the plaintiff in the amount of $2,100. While the Supreme Court reversed the case on the issue of notice, it expressly acknowledged the impropriety in awarding the plaintiff damages exceeding the amount contained in her complaint and emphatically stated that "[a] default judgment that exceeds the prayed for relief *violates this Rule.*" *Id.* at 231, N.3 (emphasis added).

The basic concepts of procedural due process demand strict adherence to the requirements of Rule 54(c). The United States Supreme Court has stated that:

> [I]n the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an

> opportunity be heard in opposition thereto, a judgment entered upon the claim is a nullity.

Sylvan Beach v. Koch, 140 F.2d 852, 861 (8th Cir. 1944), citing an support thereof, *Gallopin v. Page*, 85 U.S. 350, 368-69 (1955) (other citations omitted). In the instant case, the defendant, Lonnie Justice, was allowed to amend his *ad damnum* clause after the hearing even though such an amendment clearly violates the clear mandate of West Virginia Rule of Civil Procedure 54(c).

Unquestionably, courts when applying Rule 54(c) have distinguished between the allowance of amendments by parties who have not appeared and parties who have appeared in the action. The clear mandate of Rule 54(c) has never been questioned when a party failed to appear in the action and judgment by default was entered. 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 54.61 (2d ed. 1983). Nonetheless, a very narrow and limited exception to Rule 54(c) has been carved by a small minority of the courts. This minority position was initially enunciated by the Eighth Circuit Court of Appeals in *Peitzman v. City of Illmo*, 141 F.2d 956, 962 (8th Cir. 1964). The *Peitzman* Court held that if a party, against whom a default has been taken, appears at the damage hearing that:

> Amendments may be allowed *at* the hearing on damages as to the relief prayed, *subject to the right of the defendant, if taken by surprise or put to a disadvantage*, to ask for a continuance or for time in which to prepare the enlarged claim.

Id.

The position of the Eighth Circuit in *Peitzman* was "offered [with] no authority to support its position." 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2663 at p. 143 (1971). The *Peitzman* decision has been relied upon by some courts for the proposition that if a defaulting party is represented at the damage hearing, then it is permissible to allow the party obtaining the

default to amend his or her claim, *but only if such action is taken prior to or at the damage hearing and subject to the right of the defaulting party to request a continuance in order to meet the inflated claim. See, e.g. Peitzman v. City of Illmo, supra.* There are, however, no reported cases allowing a party to amend his pleadings after a default judgment hearing on damages has concluded. Under the minority opinion enunciated by the *Peitzman* Court it is conceivable that the defendant might have legitimately amended his pleadings prior to or at the initiation of the damage hearing. Nonetheless, even the narrow exception espoused by the Eighth Circuit in *Peitzman, supra,* would not cure the trial court's erroneous ruling because the defendant's decided not to amend his *ad damnum* clause prior to the conclusion of the hearing and thus, limited the amount of punitive damages which he would be entitled to recover, to the amount contained in his pleadings—twenty-five thousand dollars. This conclusion is supported by the plain language of West Virginia Rule of Civil Procedure 55(d), which directs that:

> In all cases a judgment by default is subject to the limitations of Rule 54(c).

One of the principle drafters of the Federal Rules of Civil Procedure, which contain identical language to that found in the West Virginia Rules of Civil Procedure, was Judge Charles E. Clark. Judge Clark acknowledged the limitation which Rule 54(c) mandates in cases where a judgment has been obtained by default and opined that "the Federal Rule might well have gone further and restricted the judgment to the demand only when the defendant has not appeared." *Pleadings & Parties,* 44 Yale L.J. 1291, 1303 (1935). The drafters of the Rules, however, decided that the limitation imposed by Rule 54(c) should apply to all cases. Thus, simply because a party appears at the damage hearing does not permit a court "to escape the explicit and emphatic mandate of Rule 54(c) which unmistakably commands that . . . the judgment 'shall not be

different in kind from or exceed in amount that prayed for in the demand for judgment' at the time of the entry of the default." *Fong v. United States*, 300 F.2d 400, 413 (9th Cir. 1962), *cert. denied*, 370 U.S. 938 (1962). Since in default judgment cases amendments to increase potential damage assessments are not authorized *before* the damage inquiry it was judicial error for this Court to allow the defendant to amend his *ad damnum* clause *after* the hearing on unliquidated damages was held.

VI. IT IS CLEAR JUDICIAL ERROR FOR THE TRIAL COURT TO ADMIT EVIDENCE RELATING TO THE PETITIONER'S TOTAL ASSETS BECAUSE EVIDENCE OF TOTAL ASSETS DOES NOT PROPERLY REFLECT FINANCIAL WORTH.

Camden does not dispute the fact that evidence of financial worth is admissible in West Virginia on the issue of punitive damages. *Pendleton v. Norfolk & Western Railway Co.*, 82 W. Va. 270, 95 S.E. 941 (1918). In the instant case, however, the financial worth of Camden is not synonymous with the evidence which was introduced by the defendant as to Camden's total assets. The term "financial worth" is defined in *Black's Law Dictionary* in the following manner:

> The value of one's property less what he owes, or the value of his resources less his liabilities.
>
> * * * *

The impropriety of the statements of defendant's counsel is painfully evident because Camden had a right to have its liability adjudicated on the facts of this particular case. No evidence was introduced as to its or any other tort-feasor's conduct in any other jurisdiction, and no evidence referring to any other tort-feasor or other tortious conduct could have properly been introduced at the hearing. This type of argument operates only to in-

flame the jury so as to punish Camden for the tortious conduct of others. *See also Dingus v. Commonwealth*, 153 Va. 846, 149 S.E. 414 (1929).

RELIEF PRAYED FOR

For the foregoing reasons, petitioner, Camden Fire Insurance Association, prays that it be granted an appeal from the following actions of the Circuit Court of McDowell County: That Court's Order of May 2, 1983 striking Camden's pleadings and entering a default judgment against Camden on the defendant's counterclaim; that Court's Order of June 1, 1983 allowing defendant to amend his *ad damnum* clause after the hearing on damages in violation of West Virginia Rule of Civil Procedure 54(c) and entering judgment against Camden in the amount of three hundred sixty-one thousand two hundred seventy-six and 16/100 cents ($361,276.16); that Court's Order of June 29, 1983 summarily refusing to set aside the aforementioned judgment and to award Camden a new trial; that Court's Order of December 21, 1983 overruling Camden's 60(b) Motion to set aside the trial Court's previously entered orders; that Court's refusal to hold an evidentiary hearing on Camden's 60(b) motion; that Court's refusal to allow Camden to tender an affidavit in support of said motion; and that Court's refusal to allow Camden to tender interrogatory answers on that same date. Further, petitioner prays that this action be reviewed and reversed by this Honorable Court or alternatively that this Court remand this action for an evidentiary hearing by the trial court. Additionally, petitioner prays that all other just and proper relief be granted.

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 16257

CAMDEN FIRE ASSOCIATION,
Appellant and
Plaintiff Below,

v.

LONNIE JUSTICE,
Appellee and
Defendant Below.

From the Circuit Court of
McDowell County, West Virginia

BRIEF ON BEHALF OF APPELLANT, CAMDEN FIRE INSURANCE ASSOCIATION

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* * * *

In many respects, this case reflects that a party, Camden, has been denied adequate representation of its interest. While lack of adequate representation has been quite often used by the courts in criminal cases to set aside judgments, it is not exclusively a judicial doctrine limited to criminal cases. In appropriate cases, such as class action suits, the courts have repeatedly held that individuals of a class who are to be bound by a judgment may contest the validity of the judgment as it applies to them on the basis that the "representatives (of their class) will vigorously prosecute the interest of the class through *qualified counsel.*" *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976), (emphasis added). *See also Gonzales v. Cassidy*, 474 F.2d 67, 73 (6th Cir. 1973).

III.

THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO SET ASIDE ITS EARIER ORDER GRANTING A POST-VERDICT AMENDMENT TO THE AD DAMNUM CLAUSE SINCE ITS EARLIER ORDER WAS UNAUTHORIZED BY THE RULES OF CIVIL PROCEDURE.

Every default judgment, be it for want of appearances or as a sanction for failure to comply with a discovery order, is subject to the applicable provisions of the West Virginia Rules of Civil Procedure. *See, e.g.*, 6 J. Moore & J. Lucas *Moore's Federal Procedure* ¶ 54.61 at 1232 (2d ed. 1983); *Id.* ¶ 55.02[3] at 15 n. 12. In this case, a default judgment was entered by the Court on the defendant's counterclaim, as a sanction under Rule 37 (d) (2), for Camden's failure to respond to interrogatories served by Mr. Justice. Nonetheless, it was a judgment by default and is subject to the provisions of Rule 55 on default judgments. Subsection (d) of that rule, in pertinent part, provides that: "[I]n all cases, a judgment by

default is subject to the limitations of Rule 54(c)." Accordingly, West Virginia Rule of Civil Procedure 54(c) mandates that:

> *A judgment by default shall not be different in kind from or exceed in amount that plead for in the demand for judgment. Except as to a party against whom a judgment is entered by default,* every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Id. (emphasis added).

Nonetheless, the trial court, after the hearing on damages, allowed the defendant, Lonnie Justice, to amend his counterclaim as to punitive damages from $25,000.00 to $300,000.00 even though neither his counterclaim nor any of the amendments to his counterclaim did not include any catch-all phrase for relief [1] and was specifically limited to $25,000.00. *See* Amended Counterclaim of Lonnie Justice. That amendment, allowed despite the plain and unequivocal language of Rule 54(c), constitutes a void judgment. *See* 49 C.J.S. *Judgments* § 214(b)(2) (1947); *Compton v. Alton Steamship Co.*, 608 Fed.2d 96, 106 (4th Cir. 1979). Resultingly, the application of Rule 60(b)(4) mandated that the lower court set aside its order allowing the aforedescribed amendment and the lower court erred in refusing to do so. Moreover, the lower court's error in refusing to set aside the void portion of the judgment, *i.e.*, $275,000.00, was a plain abuse of discretion because courts have uniformly held that the decision as to whether

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[1] For example, in his complaint appellee could have requested that the Court grant him such other relief as justice may require. Nonetheless, his prayer for relief would still be subject to the provisions of W.V.R.C.P. 54(c). *See, Intermountain Food Equiopment Co. v. Waller*, 383 P.2d 612, 616 ("[i]n in a default action a plaintiff is limited to allegations of his complaint although it contains prayer for general relief").

or not to vacate a void judgment is not within the discretion of the trial court, but rather is mandated by due process considerations. *See, e.g., Covington Industries, Inc. v. Resintex*, 529 F.2d 730, 733 (2d Cir. 1980); *Thos. P. Gonzales Corp. v. Consejo National, Ect.*, 614 F.2d 1247, 1256 (9th Cir. 1980); *T.A. Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979); *Sagers v. Yellow Freight Systems, Inc.*, 68 F.R.D. 686, 689 (D.C. Ga. 1975); *Aquachak v. Montgomery Ward Co.*, 520 P.2d 1352, 1352 (Alaska 1974); *Schoffstall v. Failey*, 389 N.E.2d 361, 363 (Ind. App. 1979).

Since the trial court had no discretion when considering the issue of whether to set aside the void order allowing the $275,000.00 amendment, the existence of a meritorious defense, although amply demonstrated herein by this appellant, is irrelevant because "a party [who] attack[s] a judgment as void need show no mentorious claim or defense or other equities on [its] behalf; [instead appellant] is entitled to [have] the judgment treated for what it is, a legal nullity." 7 J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 60.25 [2] at 224 (2d ed. 1983).

The correctness of the foregoing analysis is reinforced by the fact that the drafters of the Rules differentiated between judgments for "want of appearance" and those granted as a discovery sanction in Rules 55(b)(2) and 5(a).[2] Judge Charles E. Clark, one of the primary drafters of the Federal Rules of Civil Procedure, argued that such a distinction should be made in Rule 54(c). *C. Clark & J. Moore, A New Federal Civil Procedure—II Pleadings & Parties*, 44 Yale L. J. 1291, 1303 (1935). That proposal, however, was rejected by the Advisory

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[2] The provisions of W.V.R.C.P. 55(b)2 requires three (3) days notice when "the party agaisnt whom judgment by default is sought has appeared in the action." *Id.* Likewise, W.V.R.C.P. 5(a) states that "[n]o service need be made on parties in default for failure to appear." *Id.*

Committee on the Federal Rules of Civil Procedure.[3] The underlying policy considerations in support of the distinction argued by Judge Clark are also observed by Professors Wright & Miller in their treatise on the Rules. Nonetheless, they observe the fact that:

> [T]he first sentence of Rule 54(c) may be thought of as expressing a simple, but important, principle—

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[3] The clear mandate of Rule 54(c) has never been questioned when a party failed to appear in the action and judgment by default was entered. 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 54.61 (2d ed. 1983). Nonetheless, a very narrow and limited exception to Rule 54(c) has been carved by a small minority of the courts. This minority position was initially enunciated by the Eighth Circuit Court of Appeals in *Peitzman v. City of Illmo*, 141 F.2d 956, 962 (8th Cir. 1964). The *Peitzman* Court held that if a party, against whom a default has been taken, appears at the damage hearing that:

> Amendments may be allowed *at* the hearing on damages as to the relief prayer, *subject to the right of the defendant, if taken by surprise or put to a disadvantage,* to ask for a continuance or for time in which to prepare to meet the enlarged claim.

Id.

The position of the Eighth Circuit in *Peitzman* was "offered [with] no authority to support its position." 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2663 at p. 143 (1971). The *Peitzman* decision has been relied upon by some courts for the proposition that if a defaulting party is represented at the damage hearing, it is permissible to allow the party obtaining the default to amend his or her claim, *but only if such action is taken prior to or at the damage hearing and subject to the right of the defaulting party to request a continuance in order to meet the inflated claim. See, e.g., Peitzman v. City of Illmo, supra.* There are, however, no reported cases allowing a party to amend his pleadings after a default judgment hearing on damages had concluded. Thus, even the narrow exception espoused by the Eighth Circuit in *Peitzman, supra,* would not cure the trial court's erroneous ruling because the defendant decided not to amend his *ad damnum* clause prior to the conclusion of the hearing and, therefore, limited the amount of punitive damages which he could recover—twenty-five thousand dollars.

> at any point in a case a defendant is entitled to determine his maximum liability, as filed by the ad damnum as it stands at that point in the case, and decide whether he will proceed further, If he chooses not to, his liability cannot be increased. This principle seems applicable whether or not defendant appeals at the damage hearing and therefore should not turn on when the default occurs.

C. Wright & A. Miller, *Federal Practice and Procedure*, § 2663 at p. 144 (1981). Likewise, Professor Moore concludes that the drafters consciously rejected any distinction between the types of default judgments "and hence *all judgments by default are subject to its limitations.*" J. Moore & J. Lucas, 6 *Moore's Federal Practice* § 54.61 at 1232 (2d ed. 1983). *See also Thompson v. Wooster*, 114 U.S. 104, 110 (1985); *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979); *Pioche Mines Consolidated, Inc.*, 333 F.2d 257, 272 (9th Cir. 1964) *cert. denied* 380 U.S. 956 (1965); *Fong v. U.S.*, 300 F.2d 400 (9th Cir. 1962); *Pueblo Trading Co. v. El Camino Irr. District*, 169 F.2d 312, 313 (9th Cir. 1948) *cert. denied* 335 U.S. 911 (1949); *Sylvan Beach v. Koch*, 140 F.2d 852 (8th Cir. 1944); *National Discount Corp. v. O'Mell*, 194 F.2d 452, 456 (6th Cir. 1952); *Growth Properties, Inc. v. Klingbell Holding Co.*, 419 F. Supp. 212, 221 (D.C.Mo. 1976); *Hutchins v. Priddy*, 103 F. Supp. 601, 605-06 (W.D.Mo. 1952); *Tarnoff v. Jones*, 497 P.2d 60, 65 (Ariz. App. 1972); *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 510 S.W.2d 555, 560-61 and 567 (Ark. 1974); *Park Ave. Lumber & Supply Co. v. Nils A. Hofverberg, Inc.*, 222 N.E.2d 49, 54 (Ill. App. 1966); *Mathisen v. Mathisen*, 276 N.W.2d 123, 128 (N.D. 1979); *Sullivan v. Miller*, 337 A.2d 185, 189 (Md. App. 1975); *Servo Equipment Co. v. C. M. Lingle Co.*, 487 S.W.2d 869, 872 (Mo. App. 1972); *Hopkins v. Hopkins*, 221 S.E.2d 113 (S.C. 1975); *Intermountain Food Equipment Co. v. Waller*, 383 P.2d 612, 616 (Idaho 1963); *Meir v. Walton*,

170 S.E.2d 166, 168 (N.C. App. 1969); *Cordell v. Jarrett*, 301 S.E.2d 227 (W. Va. 1983).

This universally accepted principle was also recognized by this Court in its recent decision of *Cordell v. Jarrett*, 301 S.E.2d 227 (W. Va. 1983). In that case, this Court was confronted with a judgment by default entered, by the Magistrate Court of Kanawha County, in favor of the plaintiff for the amount plead—$100—in accordance with Rule 54(c). Subsequently, the defendant appealed, but failed to advise the Circuit Court Clerk of an address change and, thus, did not receive notice of the time and place of the trial *de novo* before the Circuit Court. *Id.* at 229. Since he had no notice, defendant failed to appear at the trial *de novo* and the Circuit Court received plaintiff's undisputed testimony that she was entitled to $2,100.00 in damages and entered a default judgment for that amount. *Id.* Although this Court reversed that case on the issue of notice, it expressly acknowledged the impropriety in awarding the plaintiff damages exceeding the amount contained in her complaint and emphatically stated that "[a] default judgment that exceeds the prayed for relief *violates* . . . [*Rule 54(c)*]. *Id.* at 231, N.3 (emphasis added).

Likewise, in *Compton v. Alton Steamship Co.*, 608 F.2d 96, 106 (4th Cir. 1979), the Fourth Circuit Court of Appeals has recently recognized this principle, as well as the constitutional considerations which underly the strict application of Rule 54(c)'s first sentence. In that case, the Court set aside a default judgment award of penalty damages and upheld the compensatory damage award because the former was neither supported by the factual allegations of the complaint nor by the evidence presented. *Id.* at 106. Under such circumstances, the "judgment entered . . . [was] null and void" and, in the Fourth Circuit's opinion, [w]ere this not so, there would well be serious due process questions." *Id.* citing *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) ("the 'right

to be heard has little reality or worth unless one is informed . . . and can choose for himself whether to appear to default, acquiesce or contest' "). *See also e.g.* Wright and Miller, 10 *Federal Practice & Procedure*, § 2663 at p. 99 (1981); *Sylvan v. Koch*, 140 F.2d 852, 861 (9th Cir. 1944).

Clearly, the foregoing authorities demonstrates the trial court's error in allowing Mr. Justice's amendment after the hearing on damages and, in doing so, violated the explicit and emphatic mandate of Rule 54(c), as well as Camden's constitutional due process rights. Therefore, the order allowing Mr. Justice to amend his *ad damnum* clause by $275,000.00 must be set aside.

* * * *

CERTIFICATE OF SERVICE

On the 10th day of October, 1984, I hereby certify that I served the foregoing "Brief of Appellant Camden Fire Insurance Association" upon G. David Brumfield, Esquire, Ballard & Brumfield, 8 Bank Street, P. O. Box 633, Welch, West Virginia 24801 and Lawrence E. Morhous, Esquire, Hudgins, Coulling, Brewster, Morhous & Cameron, 323 Law and Commerce Building, P. O. Box 529, Bluefield, West Virginia, 24701, by depositing true copies thereof in the United States mail, postage prepaid and addressed to them at the foregoing addresses.

/s/ Christopher P. Bastien

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 16357

CAMDEN FIRE ASSOCIATION,
Appellant and
Plaintiff Below,

v.

LONNIE JUSTICE,
Appellee and
Defendant Below

From the Circuit Court of
McDowell County, West Virginia

REPLY BRIEF ON BEHALF OF APPELLANT, CAMDEN FIRE INSURANCE ASSOCIATION

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* * * *

DISCUSSION OF LAW

I.

THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO SET ASIDE ITS EARLIER ORDER GRANTING A POST-VERDICT AMENDMENT SINCE THAT ORDER WAS VOID, UNCONSTITUTIONAL AND UNAUTHORIZED BY THE RULES OF CIVIL PROCEDURE

In his brief, opposing counsel suggest that once a default judgment order is entered there nevertheless is some pertinent distinction to be drawn between the procedure for setting damages depending upon what precipitated the default order. Such a suggestion is incorrect and a simple analysis will indicate why.

First, every default judgment, be it for want of appearance or as a sanction for failure to comply with a discovery order, is subject to the applicable provisions of the West Virginia Rules of Civil Procedure. *See, e.g.*, 6 J. Moore & J. Lucas *Moore's Federal Practice* ¶ 54.61 at 1232 (2d ed. 1983); *Id.* ¶ 55.02[3] at 15 n. 12. In this case, a default judgment was entered by the Court on the defendant's counterclaim, as a sanction under Rule 37(d)(2), for Camden's failure to respond to interrogatories served by Mr. Justice.

Second, the default judgment against Camden as all such judgments is subject to the provisions of Rule 55 on default judgments. Subsection (d) of that rule, in pertinent part, provides that: "[I]n *all* cases, a judgment by default is subject to the limitations of Rule 54(c)." (Emphasis added)

Third, West Virginia Rule of Civil Procedure 54(c) limits all defaults as follows:

> *A judgment by default shall not be different in kind from or exceed in amount that plead for in the demand for judgment. Except as to a party against whom a judgment is entered by default,* every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Id. (emphasis added). Thus, Rule 55(d) and Rule 54(c) expressly limit all default orders to the kind and amount sought in the complaining party's demand as proper for judgment.

While appellee Lonnie Justice argues that default judgments entered pursuant to Rule 37(b) as a sanction are not subject to the Rule 54 limitations of kind and amount a review of the leading treatises on modern procedural rules confirms that the drafters of Federal Rules of Civil Procedure 54 and 55, upon which West Virginia Rules of Civil Procedure 54 and 55 are based, meant for those rules to govern both defaults which are granted for "want of appearance" and those granted for failing "to otherwise defend." 6 J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 55.02[3] at 55-15, n. 12 (2d ed. 1983). *See* W. Va. R.C.P. 55(b); 6 J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 55.02[3] at 55-15, 17 (2d ed. 1983) 10 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2663 at p. 144 (1981). In fact, Professor Moore in his treatise on the Federal Rules of Civil Procedure aptly states that the sanction of entry of a default judgment under Rule 37(b) and (d)" is just one example of Rule 55(b)'s specific reference to those cases involving "issues of 'failure to otherwise defend'" *Id.*

The correctness of Camden's position in this regard is further confirmed by the disclosure that the drafters of the Federal Rules of Civil Procedure expressly differentiated between judgments for "want of appearance" and those granted as a discovery sanction, *i.e.*, "failure to otherwise defend," in Rules 55(b)(2) and 5(a), but ex-

pressly rejected the inclusion of such a distinction in Rule 54(c). Notably Judge Charles E. Clark, one of the primary drafters of the Federal Rules of Civil Procedure, argued to his colleagues on the original Advisory Committee that such a distinction should be made in Rule 54(c). Indeed, one of the preliminary drafts of Federal Rules of Civil Procedure 54(c) included the following distinction:

> "Except as to a party against whom judgment is rendered by default for want of appearance, the judgment shall accord the relief to which the party in whose favor it is asked is entitled on the merits of the case, regardless of whether or not the party has asked for such relief by his pleading."

Transcript of Proceedings, Meeting of the Advisory Committee on Federal Rules of Civil Procedure, November 15, 1935, at pp. 452 (Charles E. Clark Papers, Box 94 Folder 2).[1] Apparently, in light of the underlying constitutional due process notice requirements, the Advisory Committee on the Federal Rules of Civil Procedure rejected the foregoing proposal and, instead, concluded that Rule 54(c) should be applicable to all default judgments be it by failure to appear or to otherwise defend. *Cf. C. Clark & J. Moore, A New Federal Civil Procedure—II Pleadings & Parties*, 44 Yale L.J. 1291, 1303 (1935). *See Compton v. Alton Steamship Co.*, 608 F.2d 96, 106 (4th Cir. 1979); *Sylvan v. Koch*, 140 F.2d 852, 861 (8th Cir. 1944). Accordingly, one of the leading treatises sets forth the fol-

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[1] In *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272, 275 (4th Cir. 1982), the Fourth Circuit Court of Appeals stated that:

> [These] materials are fully accessible as a consequence of deposits by members of the Advisory Committee on the Civil Rules with several lawschools with which they had affiliations: Charles E. Clark, (Yale University), Edmund M. Morgan, (Harvard University), Edgar B. Tolman, (University of Chicago), and Monte M. Lemann, (Tulane University).

Id. at n. 9.

lowing analysis of Rule 54 as ultimately drafted and adopted by the Advisory Committee:

> [T]he first sentence of Rule 54(c) may be thought of as expressing a simple, but important, principle—at any point in a case a defendant is entitled to determine his maximum liability, as filed by the ad damnum as it stands at that point in the case, and decide whether he will proceed further. If he chooses not to, his liability cannot be increased. This principle seems applicable whether or not defendant appears at the damage hearing and therefore should not turn on when the default occurs.

10 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2663 at p. 144 (1981). Clearly, the draftsmen of the rule recognized its constitutional underpinnings and consciously decided to treat all default judgments in the same manner since "it [would be] fundamentally unfair to give greater or different relief in a judgment from that which the defendant was given notice by the complaint," C. Wright, *Law of Federal Courts*, 437 (2d ed. 1970), because "the 'right to be heard has little reality or worth unless one is informed . . . and can choose for himself whether to appear or default, acquiese or contest.'" *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). *See e.g. Compton v. Alton Steamship Co.*, 608 F.2d 96, 106 (4th Cir. 1979); *Sylvan v. Koch*, 140 F.2d 852, 861 (8th Cir. 1944); 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2663 at p. 99 (1981).

Refusing to recognize the validity of the foregoing authorities, the appellee attempts to justify the actions of the trial court by citing the case of *Peitzman v. City of Illmo*, 141 F.2d 956, *cert. denied*, 323 U.S. 718 (8th Cir. 1944) and the small handful of cases which follow the holding of that case asserting that such cases directly support the lower court's allowance of appellee's post-hearing amendment. *See, TWA, Inc. v. Hughes*, 449 F.2d 51 (2d Cir. 1971), and *Sarlie v. Bruce*, 265 F. Supp. 371 (S.D.N.Y.

1967) *Growth Properties, Inc. v. Klingbeil Holdings Co.*, 419 F. Supp. 212 (D.C. Md. 1976). *Peitzman* and its progeny, however, do not even touch on the question of the constitutional and procedural impropriety in allowing a post-judgment amendment and, instead, stand for a separate and distinct proposition which is that:

> Amendments may be allowed *at* the hearing on damages as to the relief prayer, *subject to the right of the defendant, if taken by surprise or put to a disadvantage,* to ask for a continuance or for time in which to prepare to meet the enlarged claim.

Id. at 962. Notably, the holding of the *Peitzman* court is of questionable constitutional validity and was "offered [with] no authority to support its position." 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2663 at p. 143 (1971). Admittedly, some courts have relied upon and cited *Peitzman* as standing for the proposition that if the defaulting party is represented at the damage hearing, after a Rule 37 or 55 default, that it is permissable to allow the party obtaining the default to amend his or her claim, *but only if such action is taken prior to or at the damage hearing and subject to the right of the defaulting party to request a continuance in order to meet the inflated claim. See, e.g. Peitzman v. City of Illmo, supra.* Appellee has cited no cases, however, wherein a court has allowed a party to amend concluded and to the knowledge of counsel for Camden *no such cases exist.*

In a desperate attempt to find a legitimate basis for the lower court's void order allowing the *post*-hearing amendment, opposing counsel argues that since a litigant's claim for punitive damages is unliquidated in nature the lower court's amendment was allowable under the holdings of *Tarnoff v. Jones*, 497 P.2d 60 (Ariz. 1972) and *Dairyland Ins. Co. v. Richards*, 476 P.2d 530 (Ariz. App. 1970). *See also, Mathisen v. Mathisen*, 276 N.W.2d 123 (N.D. 1979). *But See Intermountain Food Equipment*

Co. v. Waller, 383 P.2d 612, 616 (Idaho 1963) ([I]n a default action a plaintiff is limited to the allegations of his complaint although it contains prayer for general relief.) However, appellee's reliance upon those authorities is inapposite because they merely recognize that "a general prayer for relief", "in a sum which is reasonable and just," (*Tarnoff, supra* at 65) or a general prayer for relief pursuant to a specific statute mandating particular kinds of relief, will serve to fulfill the constitutional notice requirement recognized in Rule 54(c). Unlike the authority cited in this case, appellee's claim for punitive damages *was specifically limited to $25,000 and did not contain a general prayer for relief. See Amended Counterclaim* (R at pgs. 18-24.)

Moreover, the correctness of the foregoing analysis has also been recognized by the very court which appellee relies upon in support of his fallacious analysis. In the case of *Southern Ariz. Sch. For Boys, Inc. v. Chery*, 580 P.2d 738, 743 (Ariz. App. 1978), the Arizona court was confronted with a case involving a default on a counterclaim which originally sought $12,114.45. At the hearing on damages, the counterclaimant successfully sought leave from the trial court to amend the pre-trial order "so that it can conform to the proof of the actual amount of damages, and whatever the Defendant can prove to the court's satisfaction". Essentially, defendants in that case sought to recover a total of $27,757.78, instead of the $12,114.45 which they originally plead. On appeal, the Arizona court noted the impropriety of allowing such a post-default amendment and engaged in the following analysis:

. . . .

> Appellant's prayer for damages in its counterclaim was for $12,114.45. The final issue is whether the court erred in granting at the intial hearing on the default judgment, appellant's motion to amend the pre-trial order so as to conform to proof of actual amount of damages. A hearing under Rule 55(b) is subject to the limitation in Rule 54(d) . . . .

> he well-settled rule is that one has a right to assume that the relief granted on default will not exceed or substantially differ from that described in the complaint and may safely allow a default to be taken in reliance upon this assumption. *Columbia Valley Credit Exchange, Inc. v. Lampson*, 12 Wash. App. 952, 533 P.2d 152 (1975); *Sceva Steel Buildings, Inc. v. Weitz*, 66 Wash. 2d 260, 401 P.2d 980 (1965). One cannot recover judgment by default for a sum or for relief in excess of that warranted by the pleadings. *Husky v. Lee*, 2 Ariz. App. 129, 406 P.2d 847 (1965). A judgment in a default case that awards relief that either is more than or different in kind from that requested is null and void. *Columbia Valley Credit Exchange Inc. v. Lampson, supra.*
>
> The fact that the defaulting party appears at the hearing on damages does not allow the court to escape the explicit and emphatic mandate of Rule 54(d). *Fong v. United States*, 300 F.2d 400 (9th Cir. 1962). The rule does not differentiate between a default based on a total failure of defendant to appear and a default following an appearance. The absence of any words of qualification or differentiation in the first sentence of Rule 54(d) indicates that the provision is intended to apply to all cases of default. This conclusion is reinforced by the statement in Rule 55(d) that: 'In all cases a judgment by default is subject to the limitations of Rule 54(d).' See 10 Wright & Miller, Federal Practice and Procedure § 2663.
>
> The amount of damages appellant can recover under Rule 55(b) is thus limited by Rule 54(d) to that requested in its counterclaim, $12,114.45. . . .

Id. at 743-44. Furthermore, that Court's holding was later reaffirmed in *Darnell v. Denton*, 669 P.2d 981, 983 (Ariz. App. 1983). In *Darnell*, the Arizona court stated the following well established rules of law:

> The appellants contend that since Rule 60(c)(4), Rules of Civil Procedure, . . . allows a court to relieve a party from a void judgment, they are entitled to such relief. We agree. Further, the appellants do not need to show all of the elements necessary for a relief under Rule 60(c) . . . A void judgment may be set aside without such a showing. (Citations omitted).
>
> The default entered exceeded the relief requested in the prayer of the complaint. [Therefore,] [t]he judgment was clearly void insofar as it [exceeded the prayer for relief].

Id. The *Darnell* court also observed that this rule of law "guarantees the defendant due process". *Id.* (Citation omitted).

In this case, this Court is not confronted with an amendment at the hearing on damages as was allowed in the *Peitzman* case, *supra.*, and which was condemned by the court in the *Southern Ariz. Sch.* case, *supra.*, but this Court must consider the lower court's allowance of a post-hearing amendment. Obviously, the foregoing cases and authorities do not provide authority for upholding the lower court's post verdict amendment since the appellee chose *not* to amend his *ad damnum* clause prior to the default or at the damages hearing. By so proceeding without first seeking to amend his ad damnum clause, counsel for appellee limited the amount of damages which he could recover—twenty-five thousand dollars.

Finally, counsel for Mr. Justice suggests that the authorities cited by appellant stand for the proposition that a party may not change its cause of action but an amendment changing the amount sought is permissible. Such an asertion is not only ridiculous, but also analytically is incorrect. Opposing counsel overlooks the fact that W. Va. R.C.P. 54(c) is two-fold and prohibits judgments which are not only *different in kind from* but also *exceed in amount* that prayed for in the demand for judgment. *Id.*

Thus, courts obviously will prohibit amendments which change a litigant's cause of action as noted by appellee, but that distinction in and of itself does not serve to distinguish those cases from the cases which explicitly prohibit amendments in amount. *See* Brief of Appellant pgs. 16-17.

In light of the foregoing authorities and analysis, it is clear that the lower court violated notably the explicit and emphatic mandate of Rule 54(c), but also Camden's constitutional due process rights. Furthermore, the lower court erred by failing to recognize that it had no discretion when considering the issue of whether to set aside the improper and void order allowing the $275,000.00 amendment. In that regard it should be noted that the existence of at meritorious defense, although amply demonstrated in Camden's brief, becomes irrelevant since "a party [who] attack[s] a judgment as void (as Camden did by its Rule 60(b) motion) need show no meritorious claim or defense or other equities on [its] behalf; [instead appellant] is entitled to [have] the judgment treatment for what it is, a legal nullity." 7 J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 60.25 [2] at 244 (2d ed. 1983]. *See also, e.g., Compton v. Alton Steamship Co.*, 608 F.2d 96, 106 (4th Cir. 1979).

* * * *

CERTIFICATE OF SERVICE

On the 29th day of November, 1984, I hereby certify that I served the foregoing "Reply of Appellant Camden Fire Insurance Association" upon G. David Brumfield, Esquire, Ballard & Brumfield, 8 Bank Street, P. O. Box 633, Welch, West Virginia 24801 and Lawrence E. Morhouse, Esquire, Hudgins, Coulling, Brewster, Morhouse & Cameron, 323 Law and Commerce Building, P. O. Box 529, Bluefield, West Virginia 24701, by depositing true copies thereof in the United States mail, postage prepaid and addressed to them at the foregoing addresses.

/s/ Christopher P. Bastien

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 16537

CAMDEN FIRE ASSOCIATION,
Petitioner, former
Appellant and
Plaintiff Below,

v.

LONNIE JUSTICE,
Respondent, former
Appellee and
Defendant Below,

[Filed May 8, 1985]

PETITION FOR REHEARING ON DECISION BY THE WEST VIRGINIA SUPREME COURT OF APPEALS

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 16357

CAMDEN FIRE INSURANCE ASSOCIATION,
Petitioner, former
Appellant and
Plaintiff Below,

v.

LONNIE JUSTICE,
Respondent, former
Appellee and
Defendant Below

PETITION FOR REHEARING

KIND OF PROCEEDING AND NATURE OF PREVIOUS RULING BY THIS COURT

Petitioner, Camden Fire Insurance Association [hereinafter Camden] plaintiff below and appellant in this action represents to this Court that it is aggrieved and prejudiced by the Opinion and Decision of this Court holding that the Circuit Court of McDowell County did not abuse its discretion in denying Camden's Rule 60(b) motion seeking the set aside of that court's June 1, 1983 Order granting the post-verdict Motion of counsel for the defendant below and appellee herein, Lonnie Justice, to increase his original demand for a punitive damage judgment from $25,000.00 to $300,000.00.

POINTS OF LAW MISAPPREHENDED OR MISCONSTRUED

1. Since the cases relied upon by this Court involved notice to the defaulting party *at or before* the trial on

the increased demand for damages and are thus fundamentally different from this case where the request for increased damages came *after* the trial, this Court's failure to apply the clear wording of Rule 54(c) is without supporting authority.

2. This Court abused judicial discretion when it adopted and unjustly applied a previously unannounced procedural law holding inapplicable the clear language of Rule 54(c), prohibiting a judgment by default from exceeding the amount prayed for, where the defaulting party appears at the trial on the issue of damages.

DISCUSSION OF LAW

The Cases Relied upon by this Court for Modifying Rule 54(c) are Fundamentally Different From the Case Now Before this Court

Since the adoption of the West Virginia Rules of Civil Procedure in 1960, Rule 54(c) has clearly provided that "[a] judgment by default *shall not . . . exceed* in amount that prayed for in *the demand* for judgment. (Emphasis added). By the decision of April 11, 1985, this Court ruled that despite such wording an award of damages on a judgment by default *may* exceed the original demand for judgment where the party appears at the hearing on damages. After discussing what was characterized as the "two positions" on the propriety of allowing a damage judgment to exceed the amount of the demand in default cases, this Court stated:

> [t]hat the restriction contained in *W. Va. R. Civ. P.* 54(c) that '[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment,' does not apply where the judgment by default has been rendered as the result of the defaulting party's failure to obey an order of the circuit court to provide or permit discovery under *W. Va. R. Civ. P.* 37(b) *and*

the defaulting party otherwise appears at the subsequent trial on the issue of damages.

Opinion at page 25. (Emphasis in original.)

This Court in so modifying Rule 54(c) states that it agreed with the "reasoning espoused in *Trans-World Airlines, Inc.*". However, it is the position of Camden in this Petition for Rehearing that neither the *Trans-World Airlines, Inc.*, case nor any of the cases relied upon by this Court support the proposition that appearance at the hearing on damages by the defaulted party allows an increase in damages where the "demand" for the same comes after the close of the evidence. While this Court quotes from the text of Volume 6 of Professor Moore's work at pages 1231 through 1233, this Court fails to recognize that Professor Moore clearly states in that very discussion at footnote 11 on page 1233 that "[i]n *TWA*, Hughes Tool Company was put on notice *prior to default* that TWA would apply for an increase in the ad damnum; and the district court exercised discretion in favor of an amendment of the prayer". Thus, even assuming arguendo that *Transworld Airlines, Inc.* stands for the proposition that appearance of the defaulting party at the inquiry on damages may serve as a predicate for allowance of an increase in the ad damnum, that case only supports such a proposition where the defaulted party "was put on notice prior to default" of the increase to be sought. That situation is clearly distinguishable from the situation in this case where there was no prior notice and the complaint itself did not contain a general prayer for relief but merely sought compensatory damages and punitive damages in the specified amount of $25,000.00. Thus, the principal case relied upon by this Court and the "reasoning espoused" therein, is not the reasoning adopted in this case. If the "reasoning espoused" by *TWA* is in fact to be the reasoning adopted by this Court, that reasoning must necessarily include notice of the *demand* for the increase prior to the hearing on damages. Unlike in *TWA* that crucial notice did not occur in this case.

The second case that this Court relies upon is *Peitzman v. City of Illmo*, 141 F.2d 956 (8th Cir. 1944), cert. denied, 323 U.S. 718 (1944). However, even in the very language of that decision which was quoted by this Court, the Eighth Circuit stated "we think *amendments at the trial* are as appropriate in the one case (of default) as in the other". In the case now before this Court the amendment was not made *at the trial*, but *after* the trial. Moreover, the facts in *Peitzman* do not even confirm that the plaintiff in that case obtained any increase in the demand for damages. This very point was stressed when later the Ninth Circuit was urged to adopt the reasoning of *Peitzman* but refused to do so. In analyzing *Peitzman* the Ninth Circuit quoted from the opinion of the Eighth Circuit in *Peitzman* to demonstrate that *Peitzman* did not uphold an allowance of increased damages.

> In that case, however, the United States Court of Appeals for the Eighth Circuit said that "In this connection it should be observed that the record is in a confused condition; it in fact presents a paradox", in that, *pretrial attempts* in the Trial Court to effectuate on the record an increase in the demanded amount of the plaintiff's claim pursuant to notice and the court's approval order resulted instead in a decrease by one-half the amount demanded in the complaint before the attempted increase. *At the trial*, plaintiff moved to again amend the amount of punitive damages to $20,000.00." The Appellate Court at page 962 said that "In this state of the record it is doubtful whether the prayer for punitive damages was in fact increased in amount" since *the amount of punitive damages finally stated was the amount as that stated before any amendments were made.*" (Emphasis added.)

Fong v. United States, 300 F.2d 400, 413 (9th Cir. 1962).

The foregoing quote from *Fong* is not cited to this Court merely to reiterate that the Ninth Circuit does not

follow the "rule" of the Eighth Circuit. Rather, the foregoing cite is set forth (1) to emphasize to this Court that *Peitzman* does not factually support upholding an increased damage award and (2) to clarify that the notice of the increase in the demand in *Peitzman* came both before and at the trial not solely afterwards as in this case.

The third case cited by this Court as support for its decision is *Sarlie v. E. L. Bruce Co.*, 265 F.Supp. 371 (S.D. N.Y. 1967). Once again, the language of the cited case clearly states that "the threshold question to be considered is whether or not an amendment of the ad damnum clause may be properly made after a default at this posture of the proceedings, i.e., *after the complaint and answer have been filed and pre-trial discovery begun.*" *Id.*, at 377. (Emphasis added.) Stated simply, *Sarlie v. E. L. Bruce Co.*, does not stand for the proposition that a post-verdict amendment may be allowed to increase damages in a default case.

The fourth cited case, *Growth Properties, Inc. v. Klingbeil Holding Co.*, 419 F.Supp. 212, 220-21 (D. Md. 1967), is the only case in which "[a]fter the hearing on damages, plaintiffs asked leave, under Rule 15(b), F. R. Civ. P., to amend their complaint to claim 'all damages sustained by plaintiffs as a result of defendants' failure to pay *interest*". (Emphasis added.) After noting that "[t]he decision of this question is not free from difficulty" and that "[n]o binding authority has been cited or found" and that "other circuits reached differing results based upon differing facts", the court refused to permit such an amendment "primarily because plaintiff can so easily bring another action to recover the 'interest' and taxes which became due in 1975." *Id.*, at 221. Thus, the Maryland federal court in the cited case did not permit the very amendment this Court says the decision supports granting.

No default judgment case cited to this Court or relied upon by this Court supports the proposition that a plaintiff *after the hearing on damages* may amend his demand to increase the damages sought. While such a position was advocated in the article, Clark & Moore, *A New Federal Civil Procedure II. Pleadings and Parties*, 44 Yale L J 1291, 1303 (1935), that discussion was *prior* to the 1936 adoption of the Rules and that position was specifically rejected by the drafters of the Rule. 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2663 at 144 n. 13 (1981); *Transcript of Proceedings*, Meeting of the Advisory Committee on Federal Rules of Civil Procedure, November 15, 1935, at pp. 452 (Charles E. Clark Papers, Box 94 Folder 2).

Inasmuch as this Court placed substantial reliance upon the *Peitzman* decision, it is important to note that that opinion states that where a *pre-damage hearing* amendment is to be allowed, the appearing defendant is entitled to "time in which to prepare to meet the enlarged claim." Obviously, such an opportunity to prepare was denied Camden since the amendment came *after* the hearing not *at* the hearing. Thus, *Peitzman*, the lead case cited by this Court, does not support the cited proposition —that an amendment may be made after the damage hearing. Rather, *Peitzman* clearly stands for the proposition that even where amendments are sought before or during trial, they are not to be allowed unless the defaulted party is given "time in which to prepare to meet the enlarged claim". In this case Camden was denied the very opportunity to which *Peitzman* says a defaulting party is entitled.

In conclusion, none of the cases relied upon by this Court support the proposition that the defaulted party by appearing at the hearing on damages thereby subjects itself to increased damages where no demand for such an increase in damages is sought until after the trial.

II.

This Court's Decision was an Abuse of Judicial Discretion Since it Applied a New Procedural Law to an Unwary Litigant

The wording of Rule 54(c) has been referred to as a mandate that "is very simple, clear and decisive". *Fong v. United States,* 300 F.2d 400, 413 (9th Cir. 1962). Now, the decision in this case unquestionably changes that language and establishes a new principle of procedural law.

However, until modified by the language of this Court's opinion, the explicit language of Rule 54(c) advised judges and parties alike that as to a default judgment the judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment" at the time of entry of the default. At the time of the entry of default in this case, May 2, 1983, the demand for punitive damages was $25,000.00. In light of the clear wording of Rule 54(c) and the statement of this very Court on December 9, 1982 that "[a] default judgment that exceeds the prayed for relief violates this rule", neither Camden nor its attorney could reasonably foresee that the additional language now engrafted onto such Rule would be forthcoming *Cordell v. Jarrett,* 301 S.E.2d 227, 231 n.3 (W. Va. 1982). While this Court may decide as promulgator of the Rules of Civil Procedure to draft and incorporate new language into Rule 54(c), the decision in this case amounts to a judicial amendment, without notice, to the otherwise "simple, clear and decisive" language of the Rule. Indeed, a leading commentator has stated that "if a change is indicated, it should come by amendment". 10 C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d* § 2663 at 145 (1981).

Whether or not such a new principle of procedural law as applied in this case may be applied to parties acting

in accordance with established principles of law, was the focus of the Court's opinion in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). In that case the Court set forth an analytical framework to be used in determining whether new judicial pronouncements of procedural law could be applied to litigants having acted in accord with existing law.

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., *Hanover Shoe v. United Shoe Machinery Corp.*, supra, at 496, 20 L.Ed 2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen v. State Board of Education*, supra, at 572, 22 L.Ed. 2d at 20. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, supra, at 629, 14 L.Ed 2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, supra, at 706, 23 L.Ed 2d at 652.

Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971).

Application of the *Chevron Oil* three factor analysis clearly indicates the modified Rule 54(c) enunciated in this case is not to be applied to Camden but is only to be applied prospectively.

First, the judicial exception engrafted onto Rule 54(c) could not be foreseen and is not consistent with the clear language of the Rule. Indeed, this Court clearly recognizes this fact when in its opinion it underlines, for emphasis the words "*and the defaulting party otherwise appears at the subsequent trial on the issues of aamages*". Those underlined words are not a part of Rule 54(c). Obviously, the first factor of the three step analysis set forth in *Chevron Oil* is met. A new principle of procedural law has been adopted.

In addition, the second factor, the "history of the rule" consideration, is met since the history of Rule 54(c) reflects that no such amendment in default cases is to be allowed. As previously pointed out, the argument that such an amendment should be allowed was expressly rejected by the drafters of the federal rules and there is nothing in the history of the West Virginia Rules indicating such amendments are to be allowed. 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2663 at 143-4 (1981); Lugar & Silverstein, *W. Va. Rules* at xv (1960).

Analysis of the third consideration of "the inequity imposed" by application of the new rule unquestionably favors Camden. A leading treatise matter of factly states "[i]t would be *fundamentally unfair* to have the complaint lead defendant to believe that only a certain type and dimension of relief was being sought and then, should he attempt to limit the scope and size of the potential judgment against him by not appearing or otherwise defending, allow the court to give a different type of relief or a larger demand award". 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2663 at 140 (1981) (Emphasis added).

It must be bore in mind that "one of the primary purposes of modern systems of civil procedure purpose which has its roots in notions of *fundamental fairness* and due process, is to prevent the use of surprise and procedural ambush . . ." *Atlantic Purchasers, Inc. v. Aircraft Sales,*

Inc., 705 F.2d 712, 717 n. 6 (4th Cir. 1983) (Emphasis added). *Accord, Dils v. City of Chicago*, 378 N.E.2d 1130, 1136 (Ill. App. 1978). Indeed, citing constitutional concerns of fundamental fairness in *Atlantic Purchasers, Inc.* the Fourth Circuit affirmed a trial court's refusal to allow a prevailing plaintiff to amend its claim in order to obtain treble damages under North Carolina's unfair trade practices act. The refusal to allow the amendment was upheld even though the jury had awarded the plaintiff compensatory and punitive damages for the defendant's fraud which would necessarily constitute a violation of the Act entitling a successful plaintiff as a matter of right to treble damages. Although recognizing that the defendant had appeared to contest liability and, therefore, it was not confronted with a default situation, the court stated that even in non-default cases "Rule 54(c) is not, however, without its limits".

> A party will not be given relief not specified in its complaint where the "failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief". *United States v. Marin*, 651 F.2d 24, 31 (1st Cir. 1981). Accord, *Robinson* 444 F.2d at 803. In particular, a substantial increase in the defendant's potential ultimate liability can constitute specific prejudice barring additional relief under Rule 54(c). See *Goodman v. Poland*, 395 F.Supp. 660, 685 (D. Md. 1975). We believe that this exception to this Rule is applicable in the present case.

Id. 705 F.2d at 716-7. In default cases such as now before this Court the Fourth Circuit has been more emphatic that allowance of post-verdict amendments which increase damages not only involve a trial court's "abuse of discretion" but raise "a serious question whether the judgment was not 'null and void' for reasons" of violations of due process. *Compton v. Alton Steamship Co.*, 608 F.2d 96 107 n. 21 (4th Cir. 1979).

Applying the analytical framework set forth in *Chevron Oil* it is clear (1) that a new rule of procedural law has been established (2) that the new rule is inconsistent with the history and judicial pronouncements of that rule and (3) that application of the new rule imposes substantial inequity against Camden. Thus, application of the newly pronounced Rule 54(c) specifically prejudices Camden and application of the new rule is so unjust as to be an abuse of judicial discretion. Moreover, the abuse of judicial discretion in formulating a new rule and applying it to an unsuspecting litigant, such as Camden, raises serious constitutional due process concerns. However, since this Petitioner desires to reserve a possible federal court constitutional due process challenge to this Court's new judicially announced rule, Camden does not specifically request this Court to decide the constitutionality of its own judicially formulated Rule 54(c). Nevertheless, Petitioner must inform this Court that the issue of any unjust or prejudicial application of the new Rule to Camden must be considered *in light of* potential due process claims. *England v. Louisiana State Board of Medical Examiners* 375 U.S. 411, 420-1 (1964).

CONCLUSION

In conclusion, it is submitted that this Court's engrafting onto the clear language of Rule 54(c) an exception where counsel appear at the hearing on damages, is tantamount to judicial promulgation of an amended rule of civil procedure. Amendment of the existing rule by judicial pronouncement rather than by judicial promulgation could not reasonably have been foreseen. Thus, the application of the newly amendment Rule to Camden in this case is unjust and an abuse of judicial discretion.

WHEREFORE, this Petitioner prays that this Court will grant it a rehearing on its affirmance of the Trial Court's denial of Camden's Rule 60(b) motion to set aside the June 1, 1983 Order allowing the plaintiff to

his complaint and, upon granting such rehearing and reconsideration of its ruling, enter an Order vacating that portion of the June 1, 1983 Order of the Circuit Court of McDowell County granting the plaintiff's amendment to increase his demand for a punitive damage award from $25,000.00 to $300,000.00.

Dated this the 8th day of May, 1985.

Respectfully Submitted,

/s/ James R. Watson
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STEPTOE & JOHNSON
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Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 1985, I served a copy of the foregoing "Petition for Rehearing on Decision by the West Virginia Supreme Court of Appeals" upon G. David Brumfield, Esquire, Ballard & Brumfield, 8 Bank Street, P. O. Box 633, Welch, West Virginia 24801 and Lawrence E. Morhous, Esquire, Hudgins, Coulling, Brewster, Morhous & Cameron, 323 Law and Commerce Building, P. O. Box 529, Bluefield, West Virginia 24701, by depositing true copies thereof in the United States mail, postage prepaid and addressed to them at the foregoing addresses.

/s/ James R. Watson